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Title: Michael A. Lebron, Petitioner
v.
National Railroad Passenger Corporation

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Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: Cole,David D.

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Ptn due 3-27-94, Sunday, rcd 3-28-94.

Entry	Date	Note	Proceedings and Orders
1	Mar 28 1994	G	Petition for writ of certiorari filed.
2	Apr 28 1994		Brief of respondent National Railroad Passenger Corporation in opposition filed.
3	May 2 1994		Reply brief of petitioner filed.
4	May 4 1994		DISTRIBUTED. May 20, 1994 (Page 1)
5	May 11 1994		Lodging consisting of one packet of typewritten documents.
6	May 23 1994		Petition GRANTED.
			**********
8	Jun 8 1994		Order extending time to file brief of petitioner on the merits until July 21, 1994.
11	Jul 21 1994		Brief amici curiae of American Civil Liberties Union, et al. filed.
9	Jul 22 1994		Order further extending time to file brief of petitioner on the merits until July 25, 1994.
10	Jul 22 1994		Brief amici curiae of NAACP Legal Defense & Educational Fund, Inc., et al. filed.
13	Jul 25 1994		Brief of petitioner Michael Lebron filed.
14	Jul 25 1994		Joint appendix filed.
15	Jul 25 1994		*Joint appendix in two volumes.
12	Jul 26 1994		LODGING consisting of 10 copies of a photomontage received from counsel for the petitioner.
17	Aug 17 1994		SET FOR ARGUMENT MONDAY, NOVEMBER 7, 1994. (1ST CASE).
16	Aug 19 1994		Record filed.
		*	Partial record proceedings U.S. Court of Appeals for the Second Circuit. (BOX)
18	Sep 8 1994		Brief of respondent National Railroad Passenger Corporation in opposition filed.
19	Sep 9 1994		CIRCULATED.
20	Oct 11 1994	X	Reply brief of petitioner filed.
21	Oct 13 1994		LODGING consisting of 10 copies of United States' response in U.S. v. Kaplan Trucking Co., No.94-962-C (S.D. Ind., Sept. 16,1994), received from counsel for the petitioner.
22	Nov 7 1994		ARGUED.

FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MICHAEL A. LEBRON,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding, contrary to at least four other circuits, that a higher degree of state involvement with a private entity must be shown to establish state action for First Amendment claims than for sex and race discrimination claims.

2. Whether the court of appeals erred in holding that Amtrak's asserted policy barring the display of political advertising messages in Pennsylvania Station, New York, was not state action, where:

a) the United States created Amtrak, endowed it with governmental powers, owns all its voting stock, and appoints all the members of its Board;

b) the United States-appointed Board approved the advertising policy challenged here;

c) the United States keeps Amtrak afloat every year by subsidizing its losses; and

d) Pennsylvania Station was purchased for Amtrak by the United States and is shared with several other governmental entities.

PARTIES TO THE PROCEEDINGS

Petitioner Michael A. Lebron was plaintiff-counter-defendant-appellee below. Respondent the National Railroad Passenger Corporation (Amtrak) was defendant-appellant below. Transportation Displays, Incorporated, a defendant in the proceedings before the district court, appears on the caption of the proceedings below as defendant-counter-claimant but did not participate in the proceedings before the court of appeals.

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IN THE

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OCTOBER TERM, 1993

No.

MICHAEL A. LEBRON,

Petitioner,

—v.—

THE NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Michael A. Lebron respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 12 F.3d 388. The opinion of the district court (*id.* 1b-22b) is reported at 811 F. Supp. 993.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1993 (App., *infra*, 1c-2c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

In 1992, petitioner Michael A. Lebron contracted with respondent The National Railroad Passenger Corporation ("Amtrak"), the owner of Pennsylvania Station ("Penn Station"), to display an advertisement during January and February 1993 in a large advertising space at Penn Station known as the Spectacular (App., *infra*, 2a, 2b). The work, a photomontage with text, executed in the style of an advertisement, makes the point that the profits generated by the Coors Brewing Company support various conservative causes (*id.* at 4a-5a). During negotiations for the advertising space, Lebron had disclosed that his work was political, and was not told this would pose a problem (*id.* at 3a-4a). Three days before the beginning of the contract period, however, Amtrak informed Lebron that it would not display his work because it violated Amtrak's policy against displaying "political" advertisements (*id.* at 5a; 4b). At the time, Amtrak was displaying other political advertisements in Penn Station (*id.* at 19b-20b).

Petitioner sued Amtrak and its agent, Transportation Displays, Incorporated ("TDI"), contending that Amtrak's policy and action violated the First Amendment (*id.* at, 1b-2b). The district court, per then-District Judge Pierre N. Leval, concluded that Amtrak was a state actor and that Amtrak's advertising policy violated the Constitution (*id.* at 21b). A divided court of appeals reversed, ruling that Amtrak is not a state actor subject to the First Amendment (*id.* at 12a). Chief Judge Jon O. Newman dissented (*id.* at 13a).

A. Amtrak

The facts found by the district court relating to the state action question presented to this Court were explicitly accepted by the court of appeals (*id.* 9a, 13a). Those facts establish that the United States created Amtrak, owns all of its voting stock, wholly controls membership of its Board of

Directors, endows it with governmental powers, bankrolls it, and purchased and holds the mortgage on nearly all its property, including Penn Station.

Congress created Amtrak in 1970 with a $40 million direct federal grant and $300 million in federal loan guarantees (SE2398-99; 45 U.S.C. § 501 *et seq.*)[1] and defined it as a "mixed-ownership government corporation" (31 U.S.C. § 9101(2)(A); SE2405) (App., *infra*, 7b). Although Congress stated that Amtrak is "not . . . an agency, instrumentality, authority, or entity, or establishment of the United States Government" (45 U.S.C. § 541), Congress has made Amtrak subject to the Freedom of Information Act (45 U.S.C. § 546(g); 49 C.F.R. § 7.01 *et seq.*) and defined it as a "public entity" in the Americans with Disabilities Act (42 U.S.C. § 12131(1)). App., *infra*, 6b-7b & n.3.

The United States owns all of Amtrak's preferred and only voting stock (App., *infra*, 7b; SE2402; E426 at Note 3; E1305). The common stock, which is non-voting, is owned by private railroad companies (App., *infra*, 7b).

All of Amtrak's directors are appointed directly or indirectly by the President of the United States (45 U.S.C. § 543(a); App., *infra*, 7b). The President directly appoints five of the Board's nine members (45 U.S.C. § 543(a)(1)(C) and (D)(ii)). The Secretary of Transportation sits *ex officio* (45 U.S.C. § 543(a)(1)(A)). The United States Government, as the owner of all of Amtrak's preferred stock, selects two members (45 U.S.C. § 543(a)(1)(E)). The final Board member is Amtrak's president, who is selected by the other Board members (45 U.S.C. § 543(a)(1)(B) and (d)).

"Amtrak has also been vested with various attributes of governmental character" (App., *infra*, 8b). It has the right of

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[1] "App." refers to the appendix to the petition. "C.A. App.," "E," and "SE" refer respectively to the following documents in the court of appeals: the appendix, the exhibit volumes, and the supplemental exhibit volume.

eminent domain (45 U.S.C. § 545(d)); it is exempt from all state and local taxes, including the annual New York real estate tax on Penn Station of nearly $18 million (45 U.S.C. §§ 546(n), 546b; E353-91); and it may borrow under the credit of the federal government (45 U.S.C. § 602). App., *infra*, 8b-9b. In addition, it must report annually to Congress (45 U.S.C. § 548; App., *infra*, 9b), and its financial transactions are audited by the Inspector General and may be audited by the Comptroller General (31 U.S.C. §§ 9105-9106; App., *infra*, 8b n.5; SE2405).

The federal government is deeply involved in the financing of Amtrak's operations and the acquisition and maintenance of its assets (App., *infra*, 7b). Amtrak has never made a profit and would not exist but for massive annual subsidies from Congress (*id.* at 7b-8b; SE2413, SE2416; C.A. App. 417-20, 424). In every one of its 24 years of existence, Amtrak has depended on substantial federal subsidies to cover its losses (C.A. App. 417-20, 425). In the past five years alone, Congress has appropriated $3.312 billion to subsidize Amtrak's operating losses (45 U.S.C. § 601; SE2414; App., *infra*, 7b-8b).

Because of Amtrak's dependence on federal subsidies, a dollar of revenue earned by Amtrak is a dollar saved by the United States (App., *infra*, 8b). "For this reason, Amtrak's revenues from the leasing of its billboard space are, in a sense, revenue of the federal government" (*id.*). In recognition of this fiscal relation, Congress has instructed Amtrak to use its "best business judgment in taking actions to minimize Federal subsidies" and specifically encouraged Amtrak to enter into profit-generating contracts with the private sector in order to reduce the level of federal subsidies (45 U.S.C. § 501a(1), (14); App., *infra*, 8b n.5).

Amtrak's principal properties, including Penn Station itself, were purchased by the United States, are mortgaged to the United States, and remain under the control of Amtrak's gov-

ernment-appointed Board. Amtrak did not own any track or stations or directly operate trains until 1976 when it received the Northeast Corridor properties pursuant to congressional plan. SE2407; E453-54; E958-66. The United States "paid Penn Central $2.113 billion for the Northeast Corridor properties, including Penn Station," the largest settlement payment in United States history (App., *infra*, 9b n.7; SE2411-12 (and authority cited there)).

The federal government holds a mortgage valued at "hundreds of millions of dollars" on the Northeast Corridor properties, which secures a note that does not mature for nearly 1000 years (the year 2975) (SE2419; App., *infra*, 9b; C.A. App. 439; E425; E472). Since Amtrak acquired the Northeast Corridor, the federal government has invested billions of dollars in its maintenance, rehabilitation and development (*see* 45 U.S.C. § 854; App., *infra*, 9b). Amtrak's properties cannot be sold or leased above certain dollar amounts without approval of the Board (C.A. App. 345).

Penn Station, one of the busiest hubs in New York City, serves as a station not only for Amtrak but also for New Jersey Transit ("NJT") and the Long Island Railroad ("LIRR"), both public authorities (App., *infra*, 8b n.8). The New York subway system, operated by the New York City Transit Authority ("NYCTA"), another public authority, abuts the station at both ends (SE2365; C.A. App. 338-39; N.Y. Pub. Auth. Law § 1263 (McKinney 1982 & Supp. 1993)).

"An array of leases and joint agreements among Amtrak, LIRR, and NJT govern the management of the public areas of Penn Station, the passage of passengers through the station and from one transportation facility to another, and the funding of construction and maintenance of various train and tunnel facilities" (App., *infra*, 9b n.8). Some LIRR and NJT facilities, such as ticket and information booths, are in the midst of Amtrak's facilities on the same floor as the Spectacular (*id.*). An NYCTA official also shares space in

Amtrak's information booth (C.A. App. 671-72), and easements with NYCTA permit subway passengers to use Penn Station as a transfer point (*id.* at 338-39). Although constitutional restrictions apply to all those public authorities, the public has no way of knowing whether it is in an area governed by Amtrak or one of the other governmental transportation authorities (App., *infra*, 9b n.8).

Amtrak's Board has direct authority over Amtrak's advertising leasing policy and has delegated authority to implement that policy, subject to Board review, to Anthony DeAngelo, the Amtrak Vice President for Real Estate and Operations Development (App., *infra*, 4b, 13b & n.10; SE2382; C.A. App. 343-45, 355-56, 739-40). Amtrak's Board has consistently and closely supervised the arrangements by which advertising space is leased in Penn Station (E2-E59, E188-E201, E296-E303, E320-21, E323-36, E343, E392-E402, E444-47, E1918-21). According to DeAngelo, the policy challenged here preceded his arrival at Amtrak in 1982 (C.A. App. 334, 354, 366), was expressly reflected in leasing contracts formally approved by Amtrak's Board (*id.* at 345, 350; E31, E42, E188, E192; App., *infra*, 13b & n.10), and was consistently observed in the ten years that DeAngelo headed the Real Estate Department (C.A. App. 107). Because petitioner's two-month contract (E2219-20) fell within the range set by the Board for DeAngelo's financial signing authority, the Board authorized DeAngelo to apply its policy to Lebron's contract (App., *infra*,13b; E1039-45).

B. Proceedings Below

1. After an expedited trial based on written submissions largely stipulated by Amtrak (App., *infra*, 2b; SE2363-2435), District Judge Leval made extensive findings, detailed above, regarding Amtrak's dependence upon and control by the United States. Carefully considering all these facts, he concluded that the "federal government's deep and controlling entwinement in Amtrak's structure and operations" justified

treating Amtrak's policy regarding speech access to Penn Station billboards as state action (*id.* at 6b).

In reaching this result, Judge Leval rejected respondent's reliance on a number of cases that had held that Amtrak (or the Consolidated Rail Corporation) is not a state actor for routine employee decisions (App., *infra*, 10b-11b). Noting that "[w]hether conduct of a particular entity will be deemed governmental action can vary with the type of action at issue" (*id.* at 11b), the district court held that permitting Amtrak to deal with routine employee matters under the same rules that govern private employers did not implicate the same profound constitutional consequences as would permitting Amtrak, with its vast network of governmental involvement and properties, to allocate access to government-purchased properties to speakers on political grounds (*id.* at 11b-12b). Imbued with the powers of a private actor, Amtrak would be "free to exercise discriminatory control over the messages transmitted by its billboards" (*id.* at 12b) and, in regulating billboard advertising based on its content, Amtrak could " 'effectively drive certain ideas or viewpoints from the marketplace' " (*id.* at 13 (quoting *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991))).

The district court concluded that it was "inconceivable" that Amtrak should have such freedom to control ideas when "[its] directors are appointed by the President, [its] operations are financed by the Government, and [it] is subject to Governmental control and intertwinement in all the respects outlined above" (App., *infra*, 13b). As a consequence, Amtrak "must be deemed to engage in governmental action when it undertakes to regulate the content of the advertisements on its billboards" (*id.* at 14b).

The district court then held that Amtrak's policy for regulating advertising on its billboards violates the First Amendment because (1) it is not clearly set forth; (2) its vagueness permits abuse; (3) it is not consistently applied; and (4) it may

discriminate on the basis of viewpoint (*id.* at 14b-21b). Accordingly, the district court directed Amtrak to give petitioner "immediate access to the Spectacular in accordance with his contract" (*id.* at 22b). That order was later stayed by a panel of the court of appeals.

2. A divided court of appeals reversed, holding that "Amtrak is not a governmental actor subject to the strictures of the First Amendment" (App., *infra*, 3a). The panel majority did not "take issue" with the district court's detailed findings regarding the interrelationship between Amtrak and the federal government, but "rather with the legal conclusion that is derived from it" (App., *infra*, 9a).

The panel relied on two factors in concluding that Amtrak was not a state actor for purposes of regulating speech access to Penn Station. It held that Lebron had to meet a heightened showing of state involvement to demonstrate state action, because "a less stringent standard for finding state action should be applied when racial or sexual discrimination is at issue . . . than when there is a claim of a First Amendment violation" (App., *infra*, 10a-11a).

Second, it noted that several prior courts had found Amtrak or Conrail not to be state actors for purposes of routine employee decisions (App., *infra*, 9a, 11a-12a). It rejected Judge Leval's view that these cases were distinguishable because they did not address conduct with broad public consequences for speech by noting that one employee case, *Myron v. Consolidated Rail Corp.*, 752 F.2d 50 (2d Cir. 1985), included a First Amendment claim (App., *infra*, 9a-10a). The panel majority made no attempt to compare the facts of government involvement in the earlier cases with the facts here.

While the district court had found that *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), and its progeny compelled a finding that Amtrak and the federal government had a "symbiotic relationship" (App., *infra*, 5b-6b), the panel majority made no attempt to distinguish *Burton*, and instead

simply stated in a footnote that "[s]ome commentators have suggested" that its authority has been "curtailed" (*id.* at 8a n.1).

The panel majority did not address Judge Leval's general conclusion that it would be "inconceivable" for an entity so entwined with the federal government to have the constitutional right to regulate public speech access to Penn Station. Instead, it simply noted that although Amtrak would be free as a constitutional matter to donate its billboards to the support of the incumbent President's election, a federal election statute would prohibit such donations (App., *infra*, 11a).

Chief Judge Newman dissented (App., *infra*, 13a). Agreeing with Judge Leval, he concluded that the "extensive involvement of the Government in the structure and financing of Amtrak" qualifies Amtrak as a "governmental actor, subject to First Amendment limitations, when it undertakes to regulate the political content of advertisements on billboards" (*id.* at 14a).

Chief Judge Newman dismissed the majority's reliance on *Myron*, noting that although the plaintiff in *Myron* had bolstered his employment claim with an allegation of a First Amendment violation, "what [the court of appeals was] placing beyond constitutional scrutiny were Conrail's 'personnel decisions' " (App., *infra*, at 14a). In his view, *Myron*'s "oblique First Amendment ruling" did not mean that Amtrak could never be a state actor in regulating speech (*id.* at 15a).

Judge Newman noted that while the panel majority had dismissed the threat of outright donations of advertising space to federal candidates because they would violate criminal statutes, it did not address any of Judge Leval's other examples of the consequence of deciding that Amtrak was not a state actor, namely, that Amtrak could selectively accept advertisements that favor one side of the abortion debate or advocate adherence to a particular religion or sell advertising space only to candidates it favors (App., *infra*, at 15a). More-

over, Judge Newman noted that the availability of "a limited statutory bar to one aspect of the serious concerns raised by the District court is no answer to [petitioner]'s constitutional claim" (*id.*).

On the merits of petitioner's First Amendment claim, Judge Newman reasoned that while damages or declaratory relief would be appropriate, an injunction requiring display of the advertisement would not (App., *infra*, 15a-16a).

REASONS FOR GRANTING THE WRIT

The court of appeals' decision treats Amtrak, an entity that is public in every aspect but name, as private for constitutional purposes. It does so even where Amtrak is regulating speakers' access to Penn Station, property purchased with federal tax dollars and one of the most public spaces in New York City. There are four interrelated reasons for granting the writ:

(1) The court of appeals' decision has broad consequences for constitutional protections, because it allows an entity created and controlled by the government to selectively allocate valuable government-purchased property to speakers on political grounds, without any constitutional limitation.

(2) In conflict with at least four other circuits, the court of appeals justified its conclusion by holding that "a less stringent standard for finding state action should be applied when racial or sexual discrimination is at issue . . . than when there is a claim of a First Amendment violation." App., *infra*, 10a. The First, Fifth, Seventh, and Ninth Circuits have expressly rejected such a sliding scale analysis, and this Court has consistently applied the same state action standards to equal protection and First Amendment claims.

(3) The court of appeals' holding that Amtrak is not a state actor also conflicts with decisions of the District of Columbia, Sixth, and Eighth Circuits, which have held that government

appointment of a majority of board members is itself sufficient to establish state action.

(4) Finally, the decision conflicts with this Court's state action jurisprudence, and particularly with *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). Yet the court of appeals made no attempt to apply this Court's doctrine, nor even to distinguish *Burton*. Instead, it merely stated in a footnote that "[s]ome commentators have suggested that more recent Supreme Court cases . . . have curtailed *Burton*'s precedential authority." App., *infra*, 8a n.1. A court of appeals may not disregard this Court's decisions on the basis of commentators' suggestions.

I. THE COURT OF APPEALS' DECISION ALLOWS A GOVERNMENT-CONTROLLED INSTITUTION TO ALLOCATE VALUABLE GOVERNMENT PROPERTY TO SPEAKERS ON POLITICAL GROUNDS

Amtrak, an entity wholly controlled by government appointees and wholly dependent on government for its financial survival, denied Michael Lebron access to government-purchased property based on a policy assertedly barring "political" speech. At the same time, Amtrak granted other political advertisers access to the same government-purchased property. Were a government agency to engage in such activity, there is no question that it would have to justify its actions under First Amendment standards. Yet the court of appeals held that Amtrak need offer no constitutional justification whatsoever, because it is a wholly private entity.

Under the Second Circuit's decision, Amtrak is free to allocate government-purchased property in any way it chooses. It could sell advertising space only to the incumbent Administration during an election campaign. It could offer space only to those who advocate protection of reproductive choice, the rights of workers, and health care reform, while denying access to those who are pro-life, pro-business, and believe in

maintaining the private enterprise system for health care. In short, as a private speaker it is free to selectively allocate speech access on blatantly political grounds. Not only would the First Amendment not be violated by such action, it would affirmatively *guarantee* Amtrak's right to make such choices.

Even if Amtrak had no other government connections, the simple fact that it has been charged with allocating speech access to billions of dollars worth of government-purchased property should raise significant First Amendment concerns. When one adds to the picture the undisputed facts that Amtrak is directly answerable to the United States, the sole owner of its voting stock, that its United States-appointed Board has full authority over the leasing, sale, and use of its properties, and that it continues to exist only by infusions of hundreds of millions of tax dollars every year, the First Amendment implications of its speech access policy become inescapable.

Both then-District Judge Leval and Circuit Judge Newman found it "inconceivable" that an entity so controlled by and dependent upon federal government would be free to engage in blatantly political support of speech. The panel majority's only response was to note that federal election law would bar Amtrak from *donating* its properties to a Presidential candidate during an election campaign. This response is both insufficient and irrelevant.

First, the election laws address only the narrow issue of *donations* to candidates; they would have no applicability whatsoever to a decision to *sell* advertising space only to the incumbent Administration, or to donate space only to those speakers whose political views the Administration endorses. And they have no applicability to the content-based policy challenged here.

Second, the election laws are irrelevant to the state action issue. The fortuitous presence or absence of statutory prohibitions on hypothetical conduct does not determine whether an entity is a state actor. The fact that Congress has criminalized conspiracies to deprive individuals of their civil rights, for example, does not mean that private actors acting in concert with government officials are not also state actors for constitutional purposes. *West v. Atkins*, 487 U.S. 42 (1988). Whether Amtrak is a state actor for this case does not turn on the vagaries of election law.

If the Second Circuit's decision stands, federal, state, and local governments could avoid constitutional limits on their actions merely by labeling as "non-governmental" institutions that are in fact government-subsidized and government-controlled. This Court's state action doctrine is designed to forestall such end-runs around the Constitution.

II. THE COURT OF APPEALS' HOLDING THAT A HIGHER SHOWING OF STATE INVOLVEMENT IS NEEDED FOR FIRST AMENDMENT CLAIMS THAN FOR EQUAL PROTECTION CLAIMS CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND THIS COURT

The court of appeals reached its result by holding that "a less stringent standard for finding state action should be applied when racial or sexual discrimination is at issue . . . than when there is a claim of a First Amendment violation." App., *infra*, 10a.

This holding conflicts with decisions of four other courts of appeals, which have held that the state action standard does not differ depending on the constitutional right asserted. *Downs v. Sawtelle*, 574 F.2d 1, 6 n.5 (1st Cir.) (declining to adopt differential state action analysis, and stating that in any event court would apply same standard to discrimination and fundamental rights claims), *cert. denied*, 439 U.S. 910 (1978); *Adams v. Southern California First Nat'l Bank*, 492 F.2d 324, 333 n.23 (9th Cir. 1973) (rejecting differential state action analysis), *cert. denied*, 419 U.S. 1006 (1974); *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16, 19 (5th Cir.) (en banc)

(*Burton* state action test applies "in both racial and non-racial cases"), *cert. denied*, 429 U.S. 872 (1976); *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818 (7th Cir. 1975) (Stevens, J.) (state action analysis identical for due process and equal protection claims), *cert. denied*, 425 U.S. 943 (1976). In addition, the Third, Fourth, Sixth, Eleventh, and D.C. Circuits have implicitly rejected such a heightened requirement, applying the "symbiotic relationship" standard established in *Burton*, a race discrimination case, to First Amendment and due process claims.[2]

The court of appeals' holding is also contrary to this Court's decisions. The Court has repeatedly applied state action tests articulated in race discrimination settings to cases raising other constitutional claims, and vice versa. Thus, the Court has applied the *Burton* "symbiotic relationship" analysis to First Amendment and due process claims.[3]

The court of appeals' sliding scale makes no sense in light of the purposes of the state action doctrine. Under the court of

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[2] *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992) (applying *Burton* analysis to due process and equal protection claim based on homosexual conduct); *Jackson v. Pantazes*, 810 F.2d 426, 430 (4th Cir.1987) (finding state action under *Burton* analysis for a Fourth Amendment claim, against private bail bondsman); *Morast v. Lance*, 807 F.2d 926, 931 (11th Cir. 1987) (applying *Burton* analysis to First and Fifth Amendment claims against bank); *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94, 97-103 (3d Cir. 1984) (finding state action under *Burton* analysis for First Amendment, due process, and sex discrimination claims), *cert. denied*, 471 U.S. 1015 (1985); *Anderson v. USAir, Inc.*, 818 F.2d 49, 56 (D.C. Cir. 1987) (applying *Burton* analysis to Fifth Amendment claim against airline).

[3] *Rendell-Baker v. Kohn*, 457 U.S. 830, 842-43 (1982) (applying *Burton* analysis to First Amendment claim); *Blum v. Yaretsky*, 457 U.S. 991, 1010-11 (1982) (applying *Burton* analysis to due process claim); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357-58 (1974) (applying *Burton* analysis to due process claim); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 119 (1973) (applying *Burton* analysis to First Amendment claim).

appeals' rationale, had Amtrak denied Lebron access because of the political content of his message *and* because of his gender, it might be a state actor for purposes of the gender discrimination claim, but not for the First Amendment claim. That reasoning misses the point of the state action doctrine—to determine when a putatively private entity should be treated as an official actor, not to create a hierarchy of constitutional rights. The state action doctrine looks to the nature of government involvement in a private entity's actions, the character of the function exercised by the private entity, and other factors that demonstrate government connection or responsibility for an otherwise "private" entity's acts. None of these inquiries should vary depending on the particular constitutional right asserted.[4]

Even if some sort of sliding scale were appropriate, there is no basis for saying that more state involvement need be shown for First Amendment than for sex and race discrimination claims. Under this Court's jurisprudence, a claim of sex discrimination triggers a *lower* standard of scrutiny than a claim of discrimination on the basis of political content.[5] A decision to exclude a speaker because of his political viewpoint triggers the same strict scrutiny as a decision to exclude

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[4] *See Parks v. "Mr. Ford"*, 556 F.2d 132, 153-54 (3d Cir. 1977) (Gibbons, J., concurring) (applying different state action tests would impermissibly allow judges to impose subjective hierarchy of constitutional rights); *Isaacs v. Board of Trustees of Temple Univ.*, 385 F. Supp. 473, 485 n.11 (E.D. Pa. 1974) (Higginbotham, J.) (rejecting argument that courts "should be more reluctant to find 'state action' in cases which do not involve racial discrimination," because it is impossible to create a hierarchy of constitutional rights); Jody Young Jakosa, *Parsing Public From Private: The Failure of Differential State Action Analysis*, 19 Harv. C.R.-C.L. L. Rev. 193 (1984) (differential state action analysis based on hierarchy of rights is inconsistent with purposes of doctrine).

[5] *Compare Texas v. Johnson*, 491 U.S. 397 (1989) (requiring compelling state interest and narrowly tailored means to justify content-based restriction on speech) *with Craig v. Boren*, 429 U.S. 190 (1976) (applying intermediate scrutiny to sex discrimination claims).

a speaker because of his race.[6] Indeed, because speech is a "fundamental right," its selective deprivation triggers strict scrutiny under equal protection analysis as well.[7] Thus, to hold that a higher degree of state involvement is required for First Amendment than for equal protection claims contravenes this Court's established constitutional doctrine.

The First Amendment is as fundamental to our democratic tradition and individual liberties as the Equal Protection Clause. When a nominally "private" entity controlled, owned, and funded by government discriminates against unpopular speakers, it is just as much a state actor as when it discriminates on the basis of gender or race. By holding otherwise, the court of appeals violated established constitutional precedent and created a conflict among the circuits. The Court should resolve this circuit split, and make clear that state action analysis does not vary according to the constitutional right invoked.

III. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS HOLDING THAT GOVERNMENT APPOINTMENT OF A MAJORITY OF BOARD MEMBERS RENDERS AN OTHERWISE PRIVATE ENTITY A STATE ACTOR

The panel holds that an entity whose Board is wholly appointed by the United States is not a state actor, even where the policy at issue was itself approved by the Board. This

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[6] *Compare Texas v. Johnson*, 491 U.S. 397, *with Palmore v. Sidoti*, 466 U.S. 429 (1984) (strict scrutiny required for racial discrimination).

[7] *Carey v. Brown*, 447 U.S. 455, 474 (1980); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *see also Downs v. Sawtelle*, 574 F.2d 1, 6 n.5 (1st Cir.) (even if some differential analysis were justifiable, same state action analysis should apply to discrimination claim regarding fundamental rights as to racial discrimination claim), *cert. denied*, 439 U.S. 910 (1978).

holding conflicts with the decisions of the District of Columbia, Sixth, and Eighth Circuits, which have held that when the government appoints a majority of an entity's board or where a significant number of a board's members are government officials, the entity is a state actor. *Foster v. Ripley*, 645 F.2d 1142, 1147 (D.C. Cir. 1981) ("The fact that the majority of the members of the [private corporation's] board of directors are [government] officials in itself is sufficient to find that the government exercises control over the actions of the [private corporation]"); *McVarish v. Mid-Nebraska Community Mental Health Center*, 696 F.2d 69, 71 (8th Cir. 1982) (fact that 12 of board's 17 members "were either appointed by or actual members of county boards of supervisors or commissioners" is sufficient to establish state action); *Chiaffitelli v. Dettmer Hosp., Inc.*, 437 F.2d 429, 430 (6th Cir. 1971) (fact that four of nine board members are appointed by the government and a fifth is a public official is sufficient to make hospital a state actor).[8]

While several courts have found that Amtrak's government-controlled Board does not make it a state actor, *see* cases cited in note 14, *infra*, other courts have found government control of an entity's Board to be virtually sufficient in itself to establish state action. *Milo v. Cushing Mun. Hosp.*, 861 F.2d 1194, 1195 (10th Cir. 1988) (relying on *Burton* to find state action where hospital run by private entity, but city had substantial participation in funding, creation, and financial structure of hospital, and appointed three of five board members); *Gilmore v. Salt Lake Community Action Program*, 710

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[8] *See also O'Neill v. Grayson County War Memorial Hosp.*, 472 F.2d 1140, 1143 (6th Cir. 1973); *Meredith v. Allen County War Memorial Hosp. Comm'n*, 397 F.2d 33, 35 (6th Cir. 1968); *cf. Adams v. Vandemark*, 855 F.2d 312, 317 (6th Cir. 1988) (finding that government involvement on hospital board is "perhaps the strongest indication of a symbiotic relationship," but finding that government's appointment of one-third of board insufficient to create state action), *cert. denied*, 488 U.S. 1042 (1989).

F.2d 632, 637-38 (10th Cir. 1983) (holding that community action center was state actor where 11 of 30 board members were public officials); *Downs v. Sawtelle*, 574 F.2d at 7-8 (finding hospital to be state actor where town appointed hospital's entire board of directors, and noting that "[o]ther courts also have held that the appointment by the state of a majority of an institution's board is either determinative of or an important factor in establishing state action"); *cf. Madry v. Sorel*, 558 F.2d 303, 305 (5th Cir. 1977) (finding no state action where government members of hospital board were ceremonial, but stating that decision might be different if government's ex officio hospital board members "actually participated to some extent in running the hospital"), *cert. denied*, 434 U.S. 1086 (1978).[9]

Where the government appoints a majority of an entity's board, it has direct influence over that entity's policies. Where, as here, the government also owns all of the entity's voting stock, government control and responsibility is even greater. Under the law of three circuits, these facts would be sufficient to render Amtrak a state actor. The Second Circuit's holding conflicts with those circuits, and its failure even to address these central facts conflicts with decisions of several circuits. This Court should therefore grant certiorari to clarify the significance of government control of a nominally "private" entity's board to the state action inquiry.

[9] Indeed, the Second Circuit itself has held that, when applying the "less stringent" state action test it applies to race discrimination claims, the government's appointment of a majority of a private entity's Board may warrant a finding of state action "even if the court should find only some other significant evidence of 'state action.'" *Jackson v. Statler Found.*, 496 F.2d 623, 634-35 (2d Cir. 1974).

IV. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S STATE ACTION DECISIONS, AND PARTICULARLY WITH *BURTON V. WILMINGTON PARKING AUTHORITY*

This Court has *never* concluded that state action was absent where the government had as much direct control over an entity as the United States has over Amtrak. To find that an entity whose Board the government appoints and whose voting stock the government wholly owns is not a state actor, the court of appeals had to ignore virtually all of this Court's state action jurisprudence.

In particular, it pointedly ignored this Court's decision in *Burton v. Wilmington Parking Auth.*, 365 U.S. 715. As the district court found, the showing of state involvement in Amtrak's decision challenged here is far more extensive than that found sufficient to establish state action in *Burton*. Yet instead of attempting to distinguish *Burton*, the panel simply dropped a footnote claiming that "[s]ome commentators" have suggested that its authority is curtailed (App., *infra*, 8a n.1). The opinions of commentators, however, have no binding authority over the Second Circuit. This Court's decisions do.

In *Burton*, the Court held that private conduct qualifies as state action when "[t]he State has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity." 365 U.S. at 725. In that case, a private restaurant in a public parking garage refused to serve black customers. The Court cited three factors in finding a "symbiotic relationship" between the private actor and government: (1) close financial interdependence between the private and governmental entities, *id.* at 724; (2) governmental authority over the private entity, *id.* at 725; and (3) the sharing of physical space between the private and governmental entities, *id.* at 724-25.

The *Burton* Court found first that Delaware's financial interests were closely tied to the restaurant's discrimination

because the restaurant rented the property from the state, its customers parked in the state's garage, and the restaurant's rationale for discriminating was revenue-driven: it feared losing business from potential white customers. *Id.* at 724. Second, the *Burton* Court noted that Delaware *could* have controlled the private restaurant's conduct by requiring that it not discriminate as a condition of its lease. *Id.* at 725. And third, because the restaurant was "an integral part of a public building devoted to a parking public service," the Court found it would be a "grave injustice" to permit conduct in the private sections of the building that was constitutionally prohibited in the public sections. *Id.* at 724-25.

On each of these three factors, the facts here are stronger than in *Burton*. First, because the United States bankrolls Amtrak, every dollar of Amtrak's revenues is directly the United States' concern. The financial ties in *Burton* were indirect at best; here, they are as direct as if Amtrak were literally a government agency. Moreover, just as the restaurant in *Burton* justified its exclusion of black customers on revenue grounds, so here Amtrak justifies its policy by pointing to its potential effect on revenues from offended passengers. C.A. App. 107, 513-16, 522-24. Thus, the government has a direct revenue interest in the challenged exclusionary policy.

Second, where the *Burton* Court found state action supported by the mere fact that Delaware *could have* required the restaurant to abide by anti-discrimination principles as a term of its lease, here the United States owns all of Amtrak's voting stock and hand-picks Amtrak's Board, which approved the policy challenged here. *Cf. Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957) (suggesting that fact that state agency is a trustee for private organization is sufficient without more to make private organization a state actor).

Third, even more so than the parking garage at issue in *Burton*, Penn Station is a large public space shared by gov-

ernmental and non-governmental entities. Because of Amtrak's close intermingling of space and services with state and city transportation authorities at Penn Station, it would be "a grave injustice" to allow Amtrak to engage in the suppression of political speech that its indisputably governmental partners plainly could not undertake.[10]

Thus, unless *Burton* is no longer good law, state action is mandated by the facts presented here. While the court of appeals questioned *Burton*'s authority in a footnote, this Court has consistently cited *Burton* with approval in its state action decisions and has never suggested that *Burton* has been overruled.[11]

Indeed, the only case the court of appeals cited as possibly curtailing Burton's authority, *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987), supports state action here. In *San Francisco Arts & Athletics*, this Court carefully distinguished *Burton*, noting that plaintiffs "failed to demonstrate that the Federal Government *can or does* exert any influence over the exercise of the USOC's enforcement decisions." 483 U.S. at 547 n.29 (emphasis added). The Court expressly noted that

> '[t]he USOC is an independent body, and *nothing in its chartering statute gives the federal government the right to control that body or its officers* . . . [Nor was] the federal government . . . able to exercise any type of "*de facto*" control over the USOC.'

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[10] *International Soc. for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992) (publicly owned airport governed by First Amendment); *Penthouse Int'l v. Koch*, 599 F. Supp. 1338 (S.D.N.Y. 1984) (New York subways governed by First Amendment); *Kissinger v. New York City Transit Auth.*, 274 F. Supp. 438 (S.D.N.Y. 1967) (same).

[11] *See, e.g., Edmonson v. Leesville Concrete Co., Inc.*, 111 S. Ct. 2077, 2083 (1991); *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 547 n.29 (1987).

Id. at 545 n.27 (quoting *DeFrantz v. United States Olympic Comm.*, 492 F. Supp. 1181, 1194 (D.D.C.), *aff'd mem.*, 701 F.2d 221 (D.C. Cir. 1980) (emphasis added)). Here, by contrast, the government has direct authority over Amtrak, both by virtue of its sole ownership of voting stock and its wholesale control of the Board. Moreover, the Board has exercised that control with regard to the specific advertising policy challenged here.

This Court relied on *Burton* to find state action as recently as 1991, when it held that private attorneys for private civil litigants should be treated as state actors when they exercise peremptory challenges. *Edmonson v. Leesville Concrete Co., Inc.*, 111 S. Ct. 2077 (1991). Just as "without the overt, significant participation of the government, the peremptory challenge system . . . simply could not exist," *Edmonson*, 111 S. Ct. at 2084, so without the overt, significant participation of the United States, Amtrak could not exist. Without the United States' annual subsidies—more than $3.3 billion in the last five years alone—Amtrak would have gone bankrupt long ago. In fact, the United States created Amtrak in 1970 precisely because the few remaining private railroads were fast approaching insolvency.[12]

Through its creation, subsidy, and control of Amtrak, the United States has, like the courts in the peremptory challenge setting, " 'not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination.' " *Edmonson*, 111 S. Ct. at 2085 (quoting *Burton*, 365 U.S. at 725). The United States purchased Penn Station, and through its wholly controlled Amtrak Board it has placed its power, property, and prestige behind the policy that excluded Lebron's advertisement. Like

[12] H.R. Rep. No. 1580, 91st Cong., 2d Sess. 1, 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4735, 4735 (Amtrak created "to prevent the complete abandonment of intercity rail passenger service"). Moreover, Amtrak Vice President Anthony DeAngelo testified that running a passenger railroad is no longer a viable private business; it can only be done through massive government intervention. C.A. App. 442.

a trial court accepting a peremptory challenge, the government here has " 'create[d] the legal framework governing the [challenged] conduct,' and in a significant way has involved itself with invidious discrimination." *Edmonson*, 111 S. Ct. at 2085 (quoting *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988)).

The court of appeals neither discussed nor applied *any* of these binding principles. Other than setting forth the double standard noted above, it simply relied on the fact that it and several other lower courts had previously held that Amtrak and/or Conrail were not state actors *for the purpose of personnel decisions. See, e.g., Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 55-56 (2d Cir. 1985). Those cases are clearly not controlling here, and may be wrongly decided in light of the full extent of government involvement in Amtrak.

Even if they were correctly decided, however, *Myron* and the Amtrak employment cases are distinguishable on several grounds.[13] Dispositive to the outcome of all these cases was the fact that the government was not directly involved in the personnel actions that had triggered the suits.[14] That fact

[13] This Court has noted that a state action inquiry is "necessarily fact-bound" (*Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982)) and requires "sifting facts and weighing circumstances" (*Burton*, 365 U.S. at 722). Although the panel majority formally acknowledged that obligation (App., *infra*, 8a), it sifted no facts and weighed no circumstances. It simply cited cases holding that Amtrak (or Conrail) was a state actor without considering whether the facts of those cases justified the outcome in this one.

[14] *Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 55-56 (2d Cir. 1985) ("despite an obviously close relationship, the federal government has not 'so far insinuated itself into a position of interdependence' with Conrail that the latter's personnel decisions can be considered federal action" (quoting *Burton*, 365 U.S. at 725)); *Anderson v. National R.R. Passenger Corp. (AMTRAK)*, 754 F.2d 202, 204 (7th Cir. 1984) ("There is no allegation that the government is involved with Amtrak's personnel policies or decisions."); *Marcucci v. National R.R. Passenger Corp.*, 589 F. Supp. 725, 728 (N.D. Ill. 1984); *Kimbrough v. National R.R. Passenger Corp.*, 549 F. Supp. 169, 173 (M.D. Ala. 1982).

(footnote continued)

plainly distinguishes this case, where the policy Lebron challenged was approved by Amtrak's government-controlled Board.[15]

In addition, half the cases the panel majority cited involved Conrail, a very different entity. Conrail, which was privatized in 1987, made a profit for half of its existence and never received direct government subsidies. At the time of the challenged conduct in *Myron*, Conrail's only government "support" was in the form of loans and investments, its voting stock was not wholly owned by government, and its Board was made up of a majority of non-government-appointed members. 752 F.2d at 54-55.

Finally, a routine employment decision cannot be equated with a Board-approved policy affecting the content of speech to which thousands of members of the public are exposed every day. As Judge Leval reasoned, where an entity with substantial governmental connections adopts a policy with such sweeping public consequences, the court should be more inclined to find state action.

Of the five decisions relating to Amtrak, two do little more than rely on the analysis of the other three. *Wilson v. Amtrak Nat'l R.R. Corp.*, 824 F. Supp. 55, 57-58 (D. Md. 1992); *Railway Labor Executives' Ass'n v. National R.R. Passenger Corp.*, 691 F. Supp. 1516, 1524 n.11 (D.D.C. 1988). Similarly, the Conrail cases all simply follow *Myron* without further analysis. *G. & T. Terminal Packaging, Inc. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1237 (3d Cir. 1987); *Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 682-83 (7th Cir. 1987), *cert. denied*, 485 U.S. 988 (1988); *Morin v. Consolidated Rail Corp.*, 810 F.2d 720, 722-23 (7th Cir. 1987); *Verdon v. Consolidated Rail Corp.*, 828 F. Supp. 1129, 1137 (S.D.N.Y. 1993).

[15] The Amtrak cases also rely on Amtrak's having been established as a "for-profit" corporation. However, in 1978, Congress amended 45 U.S.C. § 541 so that it no longer says that Amtrak is a for-profit corporation, but that it shall be "operated and managed as a for profit corporation" in a candid attempt "to conform the law to reality." H.R. Rep. No. 1182, 95th Cong., 2d Sess. 1, 15, (1978), *reprinted in* 1978 U.S.C.C.A.N. 2313, 2323 ("This amendment recognizes that Amtrak is not a for-profit corporation.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 1994

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1494—August Term, 1992

(Argued: April 27, 1993 Decided: December 27, 1993)

Docket No. 93-7127

MICHAEL A. LEBRON,

Plaintiff-Counter-Defendant-Appellee,

—against—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Defendant-Appellant,

TRANSPORTATION DISPLAYS, INCORPORATED,

Defendant-Counter-Claimant.

Before:

LUMBARD, NEWMAN,* and MAHONEY,

Circuit Judges.

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* Judge Newman became chief judge of the Second Circuit Court of Appeals on July 1, 1993.

Defendant-appellant National Railroad Passenger Corporation (Amtrak) appeals from a judgment entered February 11, 1993 in the United States District Court for the Southern District of New York, Pierre N. Leval, then-*District Judge*, that required Amtrak and defendant-counter-claimant Transportation Displays, Incorporated to display a political advertisement prepared by plaintiff-counter-defendant-appellee Michael A. Lebron on a large billboard known as the Penn Station Spectacular. The district court ruled that Amtrak was a governmental actor, and had violated the First Amendment by refusing to display Lebron's advertisement pursuant to a contract leasing the Spectacular to Lebron for the months of January and February 1993.

We reverse. Chief Judge Newman dissents in a separate opinion.

MAHONEY, *Circuit Judge*:

Defendant-appellant National Railroad Passenger Corporation (Amtrak) ("Amtrak") appeals from a judgment entered February 11, 1993 in the United States District Court for the Southern District of New York, Pierre N. Leval, then-*District Judge*.* The judgment of the district court enjoined Amtrak and an advertising agency that performs services for Amtrak, defendant-counterclaimant Transportation Displays, Incorporated ("TDI"), to display a political advertisement prepared by plaintiff-counter-defendant-appellee Michael A. Lebron on a large billboard known as the Spectacular in New York City's Pennsylvania Station ("Penn Station"). Lebron had

* Judge Leval became a member of the Second Circuit Court of Appeals on November 8, 1993.

entered into a contract with TDI to lease the Spectacular for January and February 1993.

The district court ruled that because of the pervasive involvement of the federal government in Amtrak's structure and operations, Amtrak's conduct in controlling speech on its billboards must be deemed governmental, rather than private, in nature, and that Amtrak had violated the First Amendment by refusing to display Lebron's advertisement. *Lebron v. National R.R. Passenger Corp. (Amtrak)*, 811 F. Supp. 993 (S.D.N.Y. 1993).

We conclude that Amtrak is not a governmental actor subject to the strictures of the First Amendment, and accordingly reverse.

Background

In August 1991, Lebron, an artist who creates billboard displays (frequently involving commentary on public issues), first contacted TDI, which manages the leasing of many of Amtrak's billboards, about contracting for billboard space in Penn Station. The Spectacular, a curved back-lit display space approximately 103 feet wide by ten feet high, dominates the west wall of the rotunda on the upper level of Penn Station where thousands of passengers pass each day. Lebron and TDI eventually agreed that Lebron would pay $16,500 per month to rent the Spectacular for January and February 1993. On November, 30, 1992, Lebron and TDI signed an agreement (the "Lease") to that effect.

In negotiating the Lease, Lebron dealt primarily with William B. Schwartz, a TDI account executive, who informed Lebron that displays for the Spectacular containing obscenity or violence were unacceptable.

Schwartz asked Lebron about the content of the advertisement that Lebron intended for the Spectacular, but Lebron declined to disclose it, explaining that while his work was generally political, he wanted to keep the specific nature of his advertisement for the Spectacular confidential prior to its display. Schwartz did not then suggest that there might be a problem with political advertisements on the Spectacular.

Although Amtrak authorized TDI to manage the leasing of Amtrak's billboard space, Amtrak at all times retained the right to approve or reject all advertising copy that would appear on its billboards. (In practice, Amtrak only reviewed displays that were to appear on the Spectacular.) Thus, the Lease contained the following language:

> All advertising copy is subject to approval of TDI and [Amtrak] as to character, text, illustration, design and operation.
>
> . . . .
>
> If for any cause beyond its control TDI shall cease to have the right to continue the advertising covered by this contract, or if [Amtrak] should deem such advertising objectionable for any reason, TDI shall have the right to terminate the contract and discontinue the service without notice.

On December 2, 1992, Lebron submitted a color photocopy of the work he intended to display on the Spectacular to TDI, which TDI promptly forwarded to Amtrak. Lebron characterizes the advertisement as "an allegory about the destructive influence of a powerful, urban, materialistic and individualistic culture on rural, community based, family-oriented and religious cultures." The district court described it as follows:

> The work is a photomontage, accompanied by considerable text. Taking off on a widely circulated Coors beer advertisement which proclaims Coors to be the "Right Beer," Lebron's piece is captioned "Is it the Right's Beer Now?" It includes photographic images of convivial drinkers of Coors beer, juxtaposed with a Nicaraguan village scene in which peasants are menaced by a can of Coors that hurtles towards them, leaving behind a tail of fire, as if it were a missile. The accompanying text, appearing on either end of the montage, criticizes the Coors family for its support of right-wing causes, particularly the contras in Nicaragua. Again taking off on Coors' advertising which uses the slogan of "Silver Bullet" for its beer cans, the text proclaims that Coors is "The Silver Bullet that aims The Far Right's political agenda at the heart of America."

811 F. Supp. at 995.

Anthony DeAngelo, Amtrak's vice president for real estate and operations development, viewed the photocopy and disapproved the display of Lebron's advertisement on the Spectacular. In a letter dated December 23, 1992, Amtrak notified TDI of its rejection, stating that "Amtrak's policy is that it will not allow political advertising on the [S]pectacualar advertising sign."

Lebron then commenced this action against Amtrak and TDI, claiming violations of his First and Fifth Amendment rights as well as his contractual rights under the Lease. He sought equitable relief to compel Amtrak and TDI to display his ad on the Spectacular, or alternatively, damages for breach of the Lease. After expedited discovery and a trial on documentary submissions, the district court ruled that "in rejecting [Lebron's] contract to

display his art on its billboard Amtrak was engaged in governmental action and . . . the standards employed by Amtrak in rejecting his work violated its obligations under the First Amendment." 811 F. Supp. at 1005. In view of this conclusion, the district court did not reach Lebron's contractual claim. *Id.* at 1005 n.5. Judgment was entered enjoining Amtrak and TDI to display Lebron's advertisement on the Spectacular "for two months beginning on the date that follows by six (6) business days the denial or expiration of any stay of [the district court's] judgment by the highest court having jurisdiction to issue such a stay."

Amtrak applied to the district court for a stay of its judgment pending appeal to this court. The district court denied the application, but "permit[ted] delay in compliance with the judgment" for fourteen days to allow an application for a stay to this court, while recommending against the grant of any such application.

This appeal followed. In response to a motion by Amtrak, this court stayed the execution of the district court's judgment pending appeal and expedited the appeal.

Discussion

The First Amendment's directive "[t]hat 'Congress shall make no law . . . abridging the freedom of speech, or of the press' is a restraint on government action, not that of private persons." *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 114 (1973) (plurality opinion) (citing *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 461 (1952)). Thus, in considering Lebron's claim that Amtrak violated his right to free speech, the

threshold inquiry is whether Amtrak's refusal to run Lebron's advertisement on the Spectacular constitutes government action.

Government action is most readily found when the conduct at issue is performed by a government entity. However, that is not the case here. The Rail Passenger Service Act of 1970 (the "Act"), 45 U.S.C. § 501 (1988) *et seq.*, created Amtrak as a private, for-profit corporation under the District of Columbia Business Corporation Act. *See* 45 U.S.C. § 541 (1988). This legislation rejected earlier suggestions that the nation's passenger rail service be nationalized. *See* Laurence E. Tobey, *Costs, Benefits, and the Future of Amtrak*, 15 Transp. L.J. 245, 252-53 (1987). Accordingly, the Act specifies that Amtrak is "not . . . an agency, instrumentality, authority, or entity, or establishment of the United States Government." § 541; *see also National R.R. Passenger Corp. v. Atchison T. & S. F. Ry. Co.*, 470 U.S. 451, 454-55 (1985).

The government action inquiry is more difficult when the challenged conduct is performed not by the government itself, but by a private entity. The Supreme Court has articulated a variety of approaches for discerning the presence of government action in the activities of private entities. *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (private conduct deemed government action when government coerces or significantly encourages that conduct); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158-59 (1978) (private entity may be deemed government actor when performing role traditionally performed exclusively by government); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (private action deemed governmental when "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that

of the State itself"); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (private action deemed governmental when the government "has so far insinuated itself into a position of interdependence with [a private entity] that it must be recognized as a joint participant in the challenged activity").[1]

As the Supreme Court has noted, "formulating an infallible test" of government action is an " 'impossible task.' " *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967) (quoting *Burton*, 365 U.S. at 722). Rather, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton*, 365 U.S. at 722.

In this case, the district court concluded that "based on examination of the federal government's deep and controlling entwinement in Amtrak's structure and operation, . . . when Amtrak undertakes to control the content of speech on its billboards, its conduct must be deemed governmental rather than private." 811 F. Supp. at 997. Supporting this assessment, the district court described Amtrak as "a corporation whose directors are appointed

[1] Some commentators have suggested that more recent Supreme Court cases, and especially the Court's ruling that the United States Olympic Committee is not a governmental actor subject to constitutional restraints in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 542-47 (1987), have curtailed *Burton*'s precedential authority. *See* Laurence H. Tribe, *American Constitutional Law* § 18-3, at 1701 n.13 (2d ed. 1988); Marcia Berman, *An Equal Protection Analysis of Public and Private All-Male Military Schools*, 1991 U. Chi. Legal F. 211, 225-26; *see also Jackson*, 419 U.S. at 358 ("actual holding" of *Burton* limited to lessees of public property); *Adams v. Vandemark*, 855 F.2d 312, 317 n.7 (6th Cir. 1988) ("The more recent Supreme Court cases in this area appear to have limited the broad realm of state action *Burton* suggested."), *cert. denied*, 488 U.S. 1042 (1989); *Imperiale v. Hahnemann Univ.*, 776 F. Supp. 189, 195-96 (E.D. Pa. 1991) (same), *aff'd*, 966 F.2d 125 (3d Cir. 1992) (per curiam).

by the President, whose operations are financed by the federal government, and whose properties, in major part, are mortgaged to the federal government." *Id.* at 998.

We need not reiterate the details underlying this description, *see id.* at 997-98 and nn. 3-8, because we do not take issue with this aspect of the district court's opinion, but rather with the legal conclusion that is derived from it. As the district court pointed out, there are "a number of cases in which discharged employees charged either Amtrak or the similarly structured Consolidated Rail Corporation ('Conrail') with unconstitutional governmental action . . . [in which] the courts held that Amtrak's (or Conrail's) actions in dealing with its employees were not deemed to be governmental action." *Id.* at 999 (collecting cases).

One of these cases was *Myron v. Consolidated Rail Corp.*, 752 F.2d 50 (2d Cir. 1985). In that case, we held that:

> [D]espite federal funding, regulation, stock ownership and representation on the board of directors, there is nothing resembling federal supervision of day-to-day activities. In sum, we conclude that despite an obviously close relationship, the federal government has not "so far insinuated itself into a position of interdependence" with Conrail that the latter's personnel decisions can be considered federal action.

Id. at 55-56 (footnote omitted) (quoting *Burton*, 365 U.S. at 725).

The district court distinguished *Myron* and the similar precedents cited by the district court as follows:

> The fact that Amtrak is considered a private employer in administering its employment of personnel does not mean it will be deemed private when it regulates speech. Whether conduct of a particular entity will be deemed governmental action can vary with the type of action at issue. As Judge Friendly explained in *Wahba v. New York University*, 492 F.2d 96, 100 [(2d Cir.), *cert. denied*, 419 U.S. 874 (1972)], "we do not find decisions dealing with one form of state involvement and a particular provision of the Bill of Rights at all determinative in passing upon claims concerning different forms of governmental involvement and other constitutional guarantees." *See also Weise v. Syracuse University*, 522 F.2d 397, 404 (2d Cir. 1975).

811 F. Supp. at 999 (footnote omitted).

We are not persuaded by this analysis. *Myron* addressed the "government action" issue in the specific context of a "claim that Conrail violated [Myron's] First and Fifth Amendment rights by discharging him for representing various people with interests adverse to Conrail." 752 F.2d at 54. We therefore decline to regard *Myron* as a precedent confined to employee matters that does not provide strong guidance, if not controlling authority, for our decision in this First Amendment case.

Wahba also involved an assertion of First Amendment claims, but we were nonetheless "unable to discern the government action necessary to sustain . . . them." 492 F.2d at 98. *Weise* ruled that a less stringent standard for finding state action should be applied when racial or sexual discrimination is at issue, as is so often the case in employment litigation, than when there is a claim of a First Amendment violation. 522 F.2d at 405. Specifically,

although we reversed and remanded the dismissal of plaintiffs' § 1983 claims that they were denied employment or had their employment terminated because of sex discrimination, 522 F.2d at 400, 413, we explicitly stated that: "If our concern in this case were with discipline and the First Amendment, the alleged indicia of state action—funding and regulation—would most likely be insufficient." 522 F.2d at 405.

The district court expressed concern that in the absence of First Amendment restraints flowing from a finding of government action, Amtrak could post its own political advertisements on the Spectacular, postulating the example that Amtrak "would be free under the First Amendment to donate its billboards to the support of the incumbent President's election." 811 F. Supp. at 1000. Whatever its constitutional implications, which we do not address, such conduct would constitute a criminal violation of federal law. *See* 2 U.S.C. §§ 441b, 437g(d) (1988); *see also Stern v. Federal Election Comm'n*, 921 F.2d 296, 297 (D.C. Cir. 1990) (noting § 441b prohibition of corporate political contributions).

Our opinion in *Myron* accords with numerous cases that have concluded that Amtrak and Conrail are not subject to constitutional restraints upon government action. *See, e.g., Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 682-83 (7th Cir. 1987) (following *Myron*); *G. & T. Terminal Packaging Co. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1236 (3d Cir. 1987) ("Every court that has considered the matter has concluded that Conrail is not a governmental actor for purposes of constitutional analysis."), *cert. denied*, 485 U.S. 988 (1988); *Morin v. Consolidated Rail Corp.*, 810 F.2d 720, 722-23 (7th Cir. 1987) (per curiam) (following *Myron*); *Anderson v. National R.R. Passenger Corp. (Amtrak)*, 754 F.2d 202, 204-05 (7th Cir.

1984) (per curiam); *Verdon v. Consolidated Rail Corp.*, 828 F. Supp. 1129, 1137 (S.D.N.Y. 1993); *Wilson v. Amtrak Nat'l R.R. Corp.*, 824 F. Supp. 55, 57-58 (D. Md. 1992); *Railway Labor Executives' Ass'n v. National R.R. Passenger Corp.*, 691 F. Supp. 1516, 1524 n.11 (D.D.C. 1988); *Marcucci v. National R.R. Passenger Corp.*, 589 F. Supp. 725, 727-29 (N.D. Ill. 1984); *Kimbrough v. National R.R. Passenger Corp.*, 549 F. Supp. 169, 172-73 (M.D. Ala. 1982).

In view of this unvarying line of authority, and the fact that our pertinent precedent addressed an issue of First Amendment retaliation, *see Myron*, 752 F.2d at 54, we conclude that Amtrak's refusal to run Lebron's advertisement on the Spectacular was not government action, and accordingly is not to be tested against the requirements of the First Amendment. Thus, we do not reach the merits of Lebron's First Amendment claim.

In view of the dismissal of Lebron's only federal claim, it will not be appropriate for the district court to address his contract claim on remand.[2] *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966); *Eatz v. DME Unit of Local Union No. 3*, 973 F.2d 64, 67 (2d Cir. 1992). Lebron is free to pursue that claim in state court. Under N.Y. Civ. Prac. L. & R. 213 (McKinney 1990), Lebron's contract claim is subject to a six year statute of limitations. *See also id.* 205(a) (McKinney Supp. 1993), *id.* cmt. 205:2 (McKinney 1990) (in any event, Lebron may sue in state court within six months of dismissal in federal court).

[2] Correspondingly, TDI's counterclaim for a declaratory judgment that it is entitled to terminate the Lease will not be decided in this action.

Conclusion

The judgment of the district court is reversed and the case is remanded with the instruction to dismiss the complaint. As stated at oral arugment, Lebron's motion to strike pages from the joint appendix and for double costs and attorney fees is denied; his motion to file a supplemental volume of exhibits is granted.

JON O. NEWMAN, *Chief Judge*, dissenting:

The issue presented by this appeal is whether Amtrak, formally known as the National Railroad Passenger Corporation, is subject to the First Amendment when it acts to deny advertising space on the basis of political content. Because I believe the First Amendment limits Amtrak in making such decisions, I respectfully dissent.

The Court does not dispute the detailed findings of the District Court as to the extent of the Government's role in the structure and financing of Amtrak, including the undeniable fact that six members of the nine-member Amtrak board are appointed by the President of the United States, two others by the Government as owner of Amtrak's preferred stock, and the ninth member by the other board members. Instead, the Court relies on prior cases that have ruled Amtrak and Conrail not to be governmental actors when they discharge or fail to rehire workers, *see, e.g., Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 682-83 (7th Cir. 1987); *Anderson v. National R.R. Passenger Corp. (Amtrak)*, 754 F.2d 202, 204-05 (7th Cir. 1984), even where First Amendment rights are peripherally involved, *see, e.g., Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 54-56 (2d Cir. 1985).

However, it has long been the law in this Circuit, and the Supreme Court has given no contrary indication, that the state action determination is dependent in part on the nature of the constitutional right alleged to have been impaired. *See Weise v. Syracuse University*, 522 F.2d 397, 404 (2d Cir. 1975); *Wahba v. New York University*, 492 F.2d 96, 100 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974). In the District Court, Amtrak conceded that, if it restricted service to passengers on the basis of race, religion, or national origin, it would be deemed a governmental actor in that respect. *See Lebron v. National R.R. Passenger Corp. (Amtrak)*, 811 F. Supp. 993, 999 (S.D.N.Y. 1993).

In view of the extensive involvement of the Government in the structure and financing of Amtrak, I agree with then-District Judge Leval that Amtrak is a governmental actor, subject to First Amendment limitations, when it undertakes to regulate the political content of advertisements on its billboards. Our ruling in *Myron* is not a precedent for forgoing all First Amendment scrutiny with respect to Amtrak. We there ruled that Conrail was not subject to First Amendment limitations for discharging an employee for disloyalty. Though the employee, an attorney, had sought to reenforce his employment claim with an allegation that his First Amendment right to represent fellow employees in litigation was being impaired by his discharge, we made it clear that what we were placing beyond constitutional scrutiny were Conrail's "personnel decisions." *Myron*, 752 F.2d at 55-56. At most an indirect First Amendment issue was implicated. By contrast, in the pending case Amtrak purports to have complete insulation from a core First Amendment claim—that it determines the use of its resources, in this case, the availability of its advertising spaces, on the basis of political views.

In permitting this frontal First Amendment challenge to be governed by the oblique First Amendment ruling in *Myron*, the Court dismisses rather brusquely the District Court's forcefully articulated concerns as to the consequences of First Amendment exemption for Amtrak in its advertising decisions. Judge Leval pointed out that, without First Amendment limitation, Amtrak would be free to sponsor advertisements on its billboards taking sides with respect to political contests, or promoting or denigrating particular religions, or advocating its view on contentious public issues like abortion. *See Lebron*, 811 F. Supp. at 1000. The Court makes no response with respect to the prospect of Amtrak's using its advertising resources on matters of religion or public issues, and rejects the concern about politics by pointing out that "donation" of advertising space would run afoul of existing statutes. No mention is made of the District Court's valid concern about Amtrak's opportunity to sell advertising space only to candidates it favors.

In any event, the existence of a limited statutory bar to one aspect of the serious concerns raised by the District Court is no answer to Lebron's constitutional claim. The fact that a corporation like Amtrak, organized by authority of an act of Congress, would be criminally liable if its donation of advertising space were deemed to be a political contribution, *see* 2 U.S.C. §§ 441b, 437g(d) (1988), provides no remedy for a civil plaintiff like Lebron who claims a First Amendment violation because his offer to purchase advertising space has been rejected, allegedly without required limitations on Amtrak's discretion, because of the ad's political content.

Though I disagree with the majority's ruling requiring the outright dismissal of Lebron's suit, I would not uphold the District Court's injunction requiring Amtrak to display

Lebron's ad. Amtrak's advertising policy may well run afoul of First Amendment limitations, as the District Court ruled, notably because the current "vague policy provides Amtrak officials with precisely the kind of unfettered discretion to control speech that the Supreme Court has held to contravene the First Amendment," *Lebron*, 811 F. Supp. at 1003. But the policy, despite its vagueness, is claimed to prohibit political messages. This is not a case where an official, subject to First Amendment restraint, has used unfettered discretion to deny permission to use a traditional public forum like city streets for a parade. *See Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969). Amtrak's billboard space in Pennsylvania Station, even if used in the past for ads of a public service nature, has not become a forum for ads of such pointed political content as Lebron's attack on the makers of Coors beer for promoting "The Far Right's political agenda." *Lebron*, 811 F. Supp. at 995. On the present record, it is not an appropriate use of a federal court's equity power to force Amtrak to venture so extensively into the political arena. If the denial of advertising space under Amtrak's existing policies encounters First Amendment objections, damage remedies and declaratory relief will have to suffice.

For these reasons, I dissent from the judgment ordering the complaint dismissed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

92 Civ. 9411 (PNL)
Dated: February 5, 1993

MICHAEL A. LEBRON,

Plaintiff,

—against—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) and TRANSPORTATION DISPLAYS, INCORPORATED,

Defendant.

OPINION AND ORDER

Findings of Fact and Conclusions of Law

PIERRE N. LEVAL, U.S.D.J.

This is a so-called "Bivens" action,[1] brought under the First Amendment by an artist, Michael A. Lebron, would-be lessor of a gigantic billboard in New York's Pennsylvania Station. The primary defendant is Amtrak, the National Passenger Railroad Corporation, which, as owner of the billboard, rejected the two-month lease plaintiff had contracted for with Amtrak's leasing agent because plaintiff's display was "political." Plaintiff contends the rejection was inconsistent with the requirements of the First Amendment. He sues to invalidate the rejection so that he can obtain the benefit of his lease agreement.

[1] *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

As an alternative theory, plaintiff alleges that Amtrak and its leasing agent Transportation Displays Incorporated ("TDI"), the second defendant, are estopped by reason of delay from denying plaintiff's contract.

On the consent of the parties, trial was conducted on an expedited basis, upon written submissions. The court's findings of fact and conclusions of law are as follows.

Background

Lebron is an artist who creates works for display on billboards. His works often involve commentary on public issues. *See, e.g., Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984). During 1991 and 1992, he made plans for a photomontage for a particular billboard in Penn Station. The billboard is known as the Spectacular; it is a curved, back-lit display space approximately 103 feet wide and 10 feet high, covering the east-facing wall of the rotunda area, facing passengers (and others) who walk westward toward the waiting areas, ticket booths, and train platforms.

Defendant TDI is an advertising agency that handles the leasing of billboards for many of Amtrak's properties and for other billboard owners in the rail transportation system. Amtrak has authorized TDI to lease the billboards in Penn Station. While the licensing agreement reserves for Amtrak the right of approval of all advertising copy, in practice, Amtrak does not review advertising copy, excepting advertisements for the Spectacular.

In August 1991, Lebron first contacted TDI about contracting for billboard space in Penn Station. He spoke from time to time with William B. Schwartz, a TDI account executive. Schwartz told him that while no displays would be accepted that included obscenity or violence, there were no other policy restrictions on advertising.

The Spectacular was available for two months at the beginning of 1993. Lebron and TDI reached agreement on financial

terms of $18,500 a month for January and February 1993. In August 1992, Schwartz gave Lebron the standard rental form contract, which Lebron signed and returned. During the negotiations, Schwartz asked Lebron what he would display on the billboard. Lebron responded that in general his work was political, although it often looked like advertising, but that he preferred to keep confidential the specific content of the work he was creating for the Spectacular. Schwartz did not suggest that the political nature of the work would be a problem.

On November 30, 1992, TDI signed the agreement. The terms of the contract included the following:

> All advertising copy is subject to approval of TDI and the Transportation Facility concerned [*i.e.*, the owner of the billboard] as to character, text, illustration, design and operation.
>
> If for any cause beyond its control TDI shall cease to have the right to continue the advertising covered by this contract, or if the Transportation Facility concerned should deem such advertising objectionable for any reason, TDI shall have the right to terminate the contract and discontinue the service without notice.

During the fall, Lebron worked on creation of his piece for the 10 x 103 foot space. On December 2, 1992, he provided TDI with a color photocopy of his piece. The work is a photomontage, accompanied by considerable text. Taking off on a widely circulated Coors beer advertisement which proclaims Coors to be the "Right Beer," Lebron's piece is captioned "Is it the Right's Beer Now?" It includes photographic images of convivial drinkers of Coors beer, juxtaposed with a Nicaraguan village scene in which peasants are menaced by a can of Coors that hurtles towards them, leaving behind a tail of fire, as if it were a missile. The accompanying text, appearing on either end of the montage, criticizes the Coors family for its support of right-wing causes, particularly the contras in Nicaragua. Again taking off on Coors' advertising which uses the slogan of "Silver Bullet" for its beer cans, the text

proclaims that Coors is "The Silver Bullet that aims The Far Right's political agenda at the heart of America."

On December 7, TDI sent the work on to Amtrak for approval. Ten days later, Anthony DeAngelo, the Amtrak Vice President for Real Estate and Operations Development, the person authorized by Amtrak's Board of Directors to oversee third-party advertising located on Amtrak property, disapproved Lebron's work on the grounds that it was "political." Amtrak notified TDI of this decision on December 23 in a letter stating that "Amtrak's policy is that it will not allow political advertising on the [S]pectacular advertising sign." Lebron learned of Amtrak's rejection from TDI on December 29, 1992, three days before his advertisement was to appear in the Spectacular.

Discussion

A. *Governmental Action*

Lebron contends that in rejecting his work Amtrak engaged in censorship in violation of his free speech rights under the First Amendment. Alternatively put, he contends that Amtrak's actions violated the requirements that the First Amendment imposes on governmental regulation of speech. The prohibitions of the First Amendment are "a restraint on government action, not that of private persons." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 114 (1973) (citing *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952)).

Amtrak claims it is a private entity, immune from the restrictions of the First Amendment and, to the contrary, guaranteed the right under the First Amendment to control speech on its billboards in whatever fashion it chooses. The first issue in contention thus turns on whether Amtrak should be deemed a governmental or a private actor for these purposes.

"Conduct that is formally 'private' may become . . . so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."

Evans v. Newton, 382 U.S. 296, 299 (1966). The Supreme Court has outlined several ways through which the activities of a private entity can become governmental action. One such standard is relevant here.[2] Under this standard, known as the "symbiotic relationship" test, private activity becomes subject to the restrictions that the Constitution imposes on government when the government "has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961); *accord Evans v. Newton*, 382 U.S. at 299. There must be a " 'sufficiently close nexus between the State and the challenged action . . . so that the action of the [private actor] may be fairly treated as that of the State itself.' " *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). *See also Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 54 (2d Cir. 1985) (same standards applied in assessing "federal action" as for "state action") (citing cases). The symbiotic relationship test "focuses on the [government's] overall relationship with the private actor," *Hadges v. Yonkers Racing Corp.*, 918 F.2d 1079, 1082 (2d Cir. 1990), and "does not require that the plaintiff demonstrate that the state was involved in the chal-

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[2] The other two standards are the "public function" doctrine, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978), and the "state compulsion" doctrine, *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). The latter is applicable when the government "has exercised coercive power or has provided . . . significant encouragement, either overt or covert," to bring about the challenged action. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). The former doctrine holds government action may be present "if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'" *Blum*, 457 U.S. at 1005 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)); *see also Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 160 (1978). It is not enough that the government has authorized a private entity to perform a task; it must be a role traditionally performed by the state. *See Flagg Bros.*, 436 U.S. at 160-62; *Jackson*, 419 U.S. at 352-53; *see also Marsh v. Alabama*, 326 U.S. 501 (1946) (company town with all the attributes of public town subject to constitutional limitations).

lenged conduct." *Stevens v. New York Racing Ass'n, Inc.*, 665 F. Supp. 164, 171 (E.D.N.Y. 1987).

The Supreme Court has consistently emphasized that the issue of state, or governmental, action turns on a factual inquiry specific to each situation. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Authority*, 365 U.S. at 722 (private restaurant, operated in space leased from city owned parking garage, that refused service to blacks, deemed governmental actor where revenues from discriminatory service ultimately financed the public parking facility); *see Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 614 (1989) ("Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved 'in light of all the circumstances.' ") (citations omitted); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982) (determination "necessarily fact-bound"); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (private remedial school held to be non-governmental, notwithstanding state regulation and funding, in a suit by discharged teachers).

I conclude, based on examination of the federal government's deep and controlling entwinement in Amtrak's structure and operations, that, when Amtrak undertakes to control the content of speech on its billboards, its conduct must be deemed governmental rather than private.

What is clear at a glance is that Amtrak does not comfortably fit the conventional mold of either private or governmental entity.

In form and name it resembles more closely a private entity. It is a for-profit business corporation and is decreed by act of Congress "not [to] be an agency, instrumentality, authority, or entity, or establishment of the United States Government." 45

U.S.C. § 541. Its common stock is owned by private railroad companies.

On the other hand, in both image and reality, it is impregnated with governmental character and inseparably intertwined with governmental authority and financing. Looking first at the symbolic, Congress established Amtrak, 45 U.S.C. § 501, and defined it as a "mixed-ownership government corporation." 31 U.S.C. § 9101. It is defined in the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, as a "public entity."[3] 42 U.S.C. § 12131(1)(C).

More significant is the governmental penetration of Amtrak's operations. All of Amtrak's directors are appointed directly or indirectly by the President of the United States. 45 U.S.C. § 543. Of its nine board members, five are directly appointed by the President;[4] the sixth is the Secretary of Transportation sitting ex officio, who is also appointed directly by the President. Two board members are selected by the United States Government, as the owner of all of Amtrak's preferred stock. The final member of the board is the president of Amtrak, who is selected by the other directors. The parties agree that Amtrak's board is responsible for controlling Amtrak and would have the authority to approve or disapprove of Amtrak's advertising policies throughout its facilities. Indeed, the board has, by resolution, authorized Amtrak's current agreements with TDI concerning advertising.

The federal government is also deeply involved in the financing of Amtrak's operations. Every year, Congress appropriates the sum necessary to cover the shortfall of

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[3] Amtrak is also subject to the Freedom of Information Act. 45 U.S.C. § 546(g).

[4] One is selected from a list supplied by the Railway Labor Executives Association, one from among the governors of states with an interest in rail transportation, and one as a representative of business with an interest in rail transportation. 45 U.S.C. § 543(a)(1)(C). Two directors are selected from lists of names supplied by commuter authorities that work with Amtrak. § 543(a)(1)(D)(ii).

Amtrak's operating results. *See* 45 U.S.C. § 601.[5] For example, for the fiscal year ending September 30, 1993, Congress has appropriated up to $846 million for Amtrak's operating losses, capital improvements, tax liability, and labor protection costs and for the Northeast Corridor Improvement Program. Pub. L. 102-388, 106 Stat. 1520 (Oct. 6, 1992). For this reason, Amtrak's revenues from the leasing of its billboard space are, in a sense, revenue of the federal government. Every dollar of net billboard revenue realized by Amtrak results in a one dollar reduction of the subsidy obligation of the federal government. Conversely, if Amtrak subsidized any exhibitor on its billboards by charging less than the market rate, the display would essentially be financed by the federal government.[6]

Amtrak has also been vested with various attributes of governmental character. For example, Congress has given Amtrak the power of eminent domain, 45 U.S.C. § 545(d), exemption from state and local taxes and fees, including all real estate taxes, 45 U.S.C. § 546(b), and various loan guarantees, 45 U.S.C. § 602, so that it borrows under the credit of the federal

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[5] In fact, as the parties have agreed, in 1976, Amtrak's fiscal year end for accounting purposes was changed from December 31 to September 30 "to coincide with the fiscal year adopted by the federal government and used in providing federal assistance to [Amtrak]."

Congress stated as a goal that Amtrak use its "best business judgment in taking actions to minimize Federal subsidies." 45 U.S.C. § 501a(1), and Congress encouraged Amtrak to "enter into agreements with the private sector and undertake initiatives which are consistent with good business judgment and designed to maximize its revenues and minimize Federal subsidies." 45 U.S.C. § 501a(14).

[6] *See Burton*, 365 U.S. at 724 (discriminatory practices of restaurant allegedly increased business and therefore benefitted the restaurant's landlord, the government, supporting finding of state action); *Citizens to End Animal Suffering & Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F. Supp. 65, 73 (D. Mass. 1990) (state action finding supported by fact that success of private entity served financial interests of city in reviving urban area); *Stevens v. New York Racing Ass'n. Inc.*, 665 F. Supp. at 172-75 (likelihood of state action where excess revenues of the non-profit association went to the state).

government. Amtrak is required to report annually to Congress on its operations. 45 U.S.C. § 548.

Finally, the federal government has invested billions of dollars in Amtrak's properties. Amtrak acquired its Northeast Corridor properties, including Penn Station, by statutory condemnation paid for by the United States.[7] *See* Regional Rail Reorganization Act of 1973, 45 U.S.C. § 701 *et seq*. The federal government has also invested billions of dollars in the improvement of Amtrak's Northeast Corridor facilities. *See* 45 U.S.C. § 854 (authorizing up to $2.5 billion). While Amtrak owns the fee in Penn Station, the federal government holds a mortgage on it, and indeed on all the Northeast Corridor properties.[8]

Thus, when Amtrak undertakes to control the content of the messages on its billboards in Penn Station, these controls are exercised by a corporation whose directors are appointed by the President, whose operations are financed by the federal

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[7] After much litigation and negotiation, the federal government, in 1981, paid Penn Central $2.113 billion as compensation for the Northeast Corridor properties, including Penn Station.

[8] In addition, portions of Penn Station are used by other governmental entities under leases with Amtrak. For example, Amtrak leases significant portions of Penn Station to the Long Island Rail Road (LIRR) and New Jersey Transit (NJT), both public entities, for the operation of their respective rail passenger services. An array of leases and joint agreements among Amtrak, LIRR, and NJT govern the management of public areas of Penn Station and the funding of construction and maintenance of various train and tunnel facilities. Hence, portions of the station occupied by LIRR and NJT are subject to constitutional limitations, and these areas are largely contiguous with those controlled by Amtrak. Indeed, some facilities of LIRR and NJT, such as ticket and information booths, are in the midst of Amtrak's facilities on the same floor of Penn Station as the Spectacular. Notably, the public therefore has little way of knowing whether or not it is in an area where constitutional limitations apply. *See Coleman v. Wagner College*, 429 F.2d 1120, 1127 (2d Cir. 1970) (Friendly, J., concurring) (suggesting that one rationale for holding of *Burton* is that when "citizens may reasonably believe [action] to have been taken at the state's instance, state action may legitimately be found even though the state left the private actors almost complete freedom of choice").

government, and whose properties, in major part, are mortgaged to the federal government.

Amtrak contends that it cannot be deemed a governmental actor. It first cites a range of cases which found in various contexts that Amtrak is not a government agency or entity. *See, e.g., National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry. Co.*, 470 U.S. 451, 454 (1985); *National R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1264 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987); *Ehm v. National R.R. Passenger Corp.*, 732 F.2d 1250, 1253-56 (5th Cir.), *cert. denied*, 469 U.S. 982 (1984); *Kimbrough v. National R.R. Passenger Corp.*, 549 F. Supp. 169, 173 (M.D. Ala. 1982); *Sentner v. Amtrak*, 540 F. Supp. 557 (D.N.J. 1982). These cases do not determine the question in this case. Plaintiff does not contend that Amtrak is a governmental agency. What plaintiff contends is that the federal government is sufficiently entwined in Amtrak's operations and authority that the particular actions at issue must be deemed governmental action.

Next Amtrak relies on a number of cases in which discharged employees charged either Amtrak or the similarly structured Consolidated Rail Corporation ("Conrail") with unconstitutional governmental action. In each of these cases, the courts held that Amtrak's (or Conrail's) actions in dealing with its employees were not deemed to be governmental action. *See, e.g., Myron v. Consolidated Rail Corp.*, 752 F.2d 50 (2d Cir. 1985) (constitutional limitations do not apply to the activities of Conrail in discharging an individual employee); *Anderson v. National R.R. Passenger Corp.*, 754 F.2d 202, 204 (7th Cir. 1984) (in challenge to employee termination, Amtrak not a state actor); *Andrews v. Consolidated Rail Corp.*, 831 F.2d 678 (7th Cir. 1987) (Conrail not state actor in refusing to reinstate employee); *Morin v. Consolidated Rail Corp.*, 810 F.2d 720 (7th Cir. 1987) (no state action in discharging employee); *Marcucci v. National R.R. Passenger Corp.*, 589 F. Supp. 725 (N.D. Ill. 1984) (no state action in wrongful discharge suit); *Rost v. National R.R.*

Passenger Corp., 1989 WL 104809 (E.D. Pa. Sept. 11, 1989) ("no allegations concerning the nexus between the federal government and Amtrak's personnel practices."); *Hankin v. National R.R. Passenger Corp.*, 1987 U.S. Dist. LEXIS 10741 (N.D. Ill. Nov. 16, 1987) (following *Anderson*); *cf. Railway Labor Executives Ass'n v. National R.R. Passenger Corp.*, 691 F. Supp. 1516, 1524 n.11 (D.D.C. 1988) (drug testing by Amtrak not Fourth Amendment violation). Amtrak argues that these authorities conclusively determine for the present litigation that it is not a governmental actor.

The argument is unpersuasive. The fact that Amtrak is considered a private employer in administering its employment of personnel does not mean it will be deemed private when it regulates speech. Whether conduct of a particular entity will be deemed governmental action can vary with the type of action at issue.[9] As Judge Friendly explained in *Wahba v. New York University*, 492 F.2d 96, 100 (2d Cir. 1974), "we do not find decisions dealing with one form of state involvement and a particular provision of the Bill of Rights at all determinative in passing upon claims concerning different forms of government involvement and other constitutional guarantees." *See also Weise v. Syracuse University*, 522 F.2d 397, 404 (2d Cir. 1975). Indeed Amtrak conceded at oral argument that, if it restricted service to passengers on the basis of race, religion, or national origin, it would be deemed a governmental actor in that respect. *See Burton v. Wilmington Parking Authority, supra.*

In my view, the regulation of public speech through the use of the billboards in public train stations raises very different considerations from Amtrak's administration of its work force.

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[9] Indeed, several courts have concluded that Amtrak can be a state actor in the context of false arrest claims brought against Amtrak security officers. *See, e.g., Merola v. National R.R. Passenger Corp.*, 683 F. Supp. 935, 940-41 (S.D.N.Y. 1988); *Sisak v. National Railroad Passenger Corp.*, 1992 WL 42245 (S.D.N.Y. February 24, 1992).

In actions based on an employer's dealings with employees, no particularly great significance attaches to whether the employer's actions are deemed to be private or governmental. There are no important policies of the Constitution that would be undermined by permitting an employer that is entwined with government to deal with employees under the rules that govern private employers. On the other hand, where the conduct in question is the regulation of speech, enormous differences follow from whether the actor is deemed to act as government or as a private individual. And to allow an entity controlled by and intertwined with the government to regulate, control, or censor speech in the manner that is permitted for a private actor risks to do enormous damage to one of the most important principles of the Bill of Rights.

If Amtrak is deemed a private actor for this purpose, it would enjoy the full range of the private citizen's rights of free speech under the First Amendment. It would be free to exercise discriminatory control over the messages transmitted by its billboards. For example, as the Presidential election approached, Amtrak would have the absolute right to devote all of its billboards to champion the reelection of the incumbent president and warn of danger to the republic if the challenger should be elected. Amtrak would enjoy this right, just like the owner of a private bar or bowling alley who has the undeniable right to cover the walls, if he chooses, with posters advocating the reelection of the president. Similarly, Amtrak would be free to sponsor advertisements on its billboards either opposing abortion or favoring choice; it could likewise advocate adherence to Catholicism and deprecate Protestantism, or vice versa, as it chose.

If, on the other hand, Amtrak's billboard regulation is deemed governmental, Amtrak would be barred from favoring a political candidate, from favoring messages of any chosen viewpoint, from sponsoring messages that established religion, from exercising arbitrary discrimination in allowing access to its billboards, and from regulating the speech of its

billboard tenants in any way, except within narrow parameters.

Among the most powerful principles asserted by our Constitution are those found in the First Amendment designed to prevent Government from exercising discretionary control over the content of the speech of private persons and entities. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment," *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) (citations omitted), for "the Government's ability to impose content-based burdens on speech raises the spector that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S.Ct. 501, 508 (1991) (citation omitted).

Given the force of this principle, it is inconceivable that Amtrak, whose directors are appointed by the President, whose operations are financed by the Government, and which is subject to Governmental control and intertwinement in all the respects outlined above, would be free under the First Amendment to donate its billboards to the support of the incumbent President's reelection campaign. But that is the inevitable consequence if Amtrak is correct in its contention that it is engaged in private action when it controls the content of ads on its billboards.

One might argue that the conclusion should be otherwise when control is exercised not by the Presidentially-appointed directors, but by a lower level employee. But the argument is not persuasive. Regardless to what degree the board of directors exercises its control, it has the power to control the actions of the corporation it governs. Furthermore, the controls here at issue were exercised by a high officer, the director of Amtrak's real estate operations, to whom the Amtrak board had directly delegated such authority.[10]

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[10] Indeed, the minutes of meetings of Amtrak's board of directors show that the board has, on at least one occasion, authorized an individual lease for the Spectacular.

I conclude that, notwithstanding Amtrak's private character in its employment contracts, it must be deemed to engage in governmental action when it undertakes to regulate the content of the advertisements on its billboards.

B. *The Requirements of the First Amendment*

I now turn to the question whether Amtrak's actions comport with the requirements that the First Amendment places on such governmental conduct.

Along with other constraints, the First Amendment requires that, when the government regulates speech, it must do so by a policy that is (i) clearly set forth, (ii) not so vague as to be subject to abuse, (iii) consistently applied and (iv) not based on viewpoint. These rules are intended to avoid the risk that government may impose arbitrary, discriminatory, or preferential controls on speech. *See generally City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-764 (1988) (invalidating ordinance giving town mayor complete discretion in licensing sidewalk newsracks). Without explicit standards, clearly disclosed government regulation of speech may be applied in an arbitrary and discriminatory manner. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 286-87 (1961) (terms of regulation must be "susceptible of objective measurement"). The Supreme Court has cautioned that a scheme for regulating speech "that places 'unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.' " *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 605 (1990) (quoting *Lakewood*, 486 U.S. at 757). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). In addition, a government restriction may not discriminate against speech on the basis of the viewpoint of the speaker. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (regulation of public forum must be content-neutral; regulation of non-public forum must

be viewpoint-neutral); *see also United States v. Kokinda*, 110 S. Ct. 3115, 3121 (1990); *Longo v. United States Postal Service*, 953 F.2d 790, 796 (2d Cir.) ("[r]estrictions on expression because of disagreement with message or idea being conveyed by the speaker" violate First Amendment), *vacated and remanded on other grounds*, 113 S. Ct. 31 (1992), *reinstated*, ___ F.2d ___, 1992 WL 383112 (2d Cir., Dec. 28, 1992); *see generally International Society for Krishna Consciousness v. Lee*, 112 S. Ct. 1701 (1992).

I find that Amtrak's policy violates the first three (and possibly also the fourth) of these requirements.

(i) *Not clearly set forth.* The Amtrak policy identified by Mr. DeAngelo as the reason for the rejection is its prohibition of "political" advertisements in Penn Station. Nowhere is this policy committed to writing. Nor was the existence of the policy disseminated. Thus TDI, which leased out nearly all the billboards in Penn Station without consulting Amtrak, was unaware of the policy's existence. An unwritten censorship policy is susceptible to inconsistent application that threatens free speech. *See Lakewood*, 486 U.S. at 757; *see also Abel v. Town of Orangetown*, 759 F. Supp. 161, 164-65 (S.D.N.Y. 1991) (invalidating zoning ordinance allowing town board unfettered discretion in granting consent to place sign on town property); *New Alliance Party v. Dinkins*, 743 F. Supp. 1055, 1064-65 (S.D.N.Y. 1990) (special events permitting system of parks violated First Amendment where permits granted or refused without any regulatory guidelines).

In attempting to identify a writing that contains its policy, Amtrak points to two earlier advertising licensing agreements between Amtrak (or its predecessor, the Pennsylvania Railroad Company) and TDI. These agreements, dated 1967 and 1980, governed TDI's leasing of the Spectacular. Both agreements contained a provision stating that Amtrak could refuse any advertising that Amtrak, "in its judgment," may deem "unlawful, immoral, improper or offensive to good taste . . . or involve political or other views which could result in

dissension or involve [Amtrak] in dissension, complaints or controversy with its patrons or the public . . . ."

However, neither of these licensing agreements is still in effect. The 1980 agreement, which superseded the 1967 agreement, was itself superseded by another agreement in 1985 covering all Amtrak billboards in Penn Station. The 1985 agreement and its successor, the 1991 agreement, do not include any provision comparable to the one in the 1967 and 1980 agreements. They do state that, "All advertising material, exhibit material, notices and advertisements, and their manner of presentation and design, shall be subject to approval by Amtrak, which may disapprove any such items at its own discretion." This broad provision clearly does not state, or even imply, the rejection of all "political" advertising.

Moreover, the evidence makes clear that Amtrak's supposed policy rejecting "political" advertising was not even known to many of those responsible for billboard advertising. William P. Delaney, a project manager in Amtrak's Real Estate Department who is responsible for supervising Amtrak's arrangements with TDI for advertising in Amtrak's facilities, knew of no prohibition on "political" advertising applicable to any of Amtrak's facilities. None of the executives at TDI, who had been leasing Penn Station billboard space for years and who had authority to approve advertising copy for all areas other than the Spectacular, knew of Amtrak's policy barring "political" advertisements.

(ii) *Vague*. Even if Amtrak's policy, as expressed by Mr. DeAngelo, were in writing, or otherwise clearly set forth, such a policy would still be constitutionally infirm, for the term "political" is of such unclear meaning that it is easily susceptible to arbitrary or discriminatory censorship by those administering the policy. *See Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 513-14 (9th Cir. 1988) (invalidating as vague regulations that barred issuing educational certificates to documentary films that attempted "to influence opinion, conviction or policy (religious, economic, or political propaganda), to espouse a cause, or conversely, when they seem to attack a particular persuasion" and that "appear to have as their purpose or effect to attach or discredit economic, religious, or political views or practices"); *see also Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) ("conduct . . . annoying to persons passing by" unconstitutionally vague); *Gay Men's Health Crisis v. Sullivan*, 792 F. Supp. 278, 293-96 (S.D.N.Y. 1992) ("offensive to a majority of adults" unconstitutionally vague).

The policy might be thought, for example, to bar only advertisements relative to candidates for political office. It might be thought to encompass public service messages on public issues, including drunk driving, safe sex, abortion counselling, and religious messages. It might also cover commercial advertising that included public service messages like "Keep America Beautiful," or that discussed controversial issues.

Amtrak's executives were themselves at odds over the meaning of Amtrak's policy. Mr. DeAngelo at times indicated that the policy prohibited only those advertisements that were both "political" *and* divisive or objectionable; at other times, he stated that the policy prohibited all advertisements that were not devoted to the selling of a product or service. Bruce M. Bourque, Amtrak's Project Director for Real Estate Development for Penn Station, who first reviews advertising material submitted for the Spectacular, knew that there was a policy barring "political" advertisements, but he could not really say what such a policy meant. *See U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 769 (D.C. Cir. 1983) ("the hazy line between ideological and commercial speech is reflected in the record of this case").

This is not to say that reasonable individuals could never agree that a particular advertisement was or was not "political." As the court explained in *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d at 769,

> The point is not that the distinction between commercial and political speech is entirely unworkable—there is little doubt that it can operate successfully at the extremes to screen out patently political from wholly commercial advertisements. Rather, the point is that there is a gray area near the middle in which this particular subject matter restriction tends to operate as a *sub rosa* penalty on presenting political viewpoints in "controversial," as opposed to more benign "commercial," forms.

This again reflects the manner in which Amtrak's policy is susceptible to abuse, for "[a]pplying this guideline involves an exercise of discretion and subjective judgment on the part of [Amtrak] officials." *Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893, 899 (D.C. Cir. 1984). In such circumstances, the threat is great that "the policy operates in part to screen out only controversial, but not non-controversial, political messages." *U.S. Southwest Africa/Namibia Trade & Cultural Council*, 708 F.2d at 769.

Amtrak contends that the term "political" as employed in its policy means to include (and therefore prohibit) all advertisements that do not seek to sell a product or service. However, that is certainly not what the term "political" is generally understood to mean, and, as noted, this is not how the relevant personnel understand the policy. When a standard for governmental control of speech is so unclear, there is a high likelihood of inconsistent and discriminatory application. Such a vague policy provides Amtrak officials with precisely the kind of unfettered discretion to control speech that the Supreme Court has held to contravene the First Amendment. *See, e.g., FW/PBS, Inc.*, 110 S. Ct. at 605; *Lakewood*, 486 U.S. at 757; *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969); *Saia v. New York*, 334 U.S. 558, 560 (1948) ("There are no standards prescribed for the exercise of [the official's] discretion."); *see generally Staub v. City of Baxley*, 355 U.S. 313, 322 (1958) ("It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms with the Constitution guarantees contingent upon the uncontrolled will of an official—

as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.").

(iii) *Not consistently applied.* A further infirmity in Amtrak's "no political advertisements" policy is that it is not consistently applied. As noted above, the policy is unknown to Amtrak's leasing agent, with the result that billboard space in Penn Station has repeatedly been leased for advertisements that are "political" in the sense of Amtrak's definition. Indeed, the licensing agreement between Amtrak and TDI expressly allows for public service advertisements (at reduced rates or no charge). And TDI maintains written *Guidelines For Public Service Advertising*. They provide that such advertising will be displayed (at less than full rate) for no more than a thirty-day period, only when space is available and may be pre-empted by any commercial (*i.e.*, full rate) advertising. The guidelines are designed to insure that such non-commercial advertisements shall be accepted only from "recognized, legitimate [tax exempt] not-for-profit organizations, corporations, National, State or Local government agencies and subdivisions, philanthropic or cultural organizations whose activities would be of interest or benefit to a majority of the area population," and that the advertisements adhere to "good taste, decency and community standards." It is clear that all of the advertisements covered by the Guidelines for Public Service Advertising are of the type that Amtrak contends are prohibited by its rule.

Furthermore, TDI's leasing guidelines do recognize a distinction affecting advertisements that are "political." The TDI guideline, however, does not reject them, but rather considers them commercial and therefore subject to full rate charge.[11]

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[11] Particularly baffling in the context of this case is the TDI guideline that states:

> Because of the separation of Church and State dictates of our Constitution, organizations that are primarily religious in structure *do not* qualify for Public Service space.

(Emphasis in original).

It is clear beyond dispute that Amtrak's policy is not being consistently followed. TDI's records show that it leases space to advertisers that are not "commercial," and some of which are arguably "political." These include the New York Department of the Environment, the New York Department of Commerce, a foundation for muscular dystrophy, and *Plain Truth* magazine, a free magazine on political and social issues published by The Worldwide Church of God. In addition, testimony of the general counsel of TDI indicates that TDI regularly displays public service advertisements, including subjects such as the homeless, the environment, drunk driving, AIDS awareness, health issues, and race relations.

(iv) *Void for viewpoint bias.* Furthermore, depending on which of the many proffered versions really is Amtrak's policy, the policy may also be void because of discrimination based on viewpoint. *See Perry Educ. Ass'n*, 460 U.S. at 45-46.

If, for example, Amtrak's policy, as Mr. DeAngelo sometimes testified, is directed against divisive, controversial, or objectionable matter, or if, as set forth in the 1967 and 1980 agreements with TDI, it gives Amtrak discretion to refuse any advertising involving "views which could result in dissension or involve [Amtrak] in dissension, complaints or controversy with its patrons or the public . . . ," it would be void; government may not regulate speech by such criteria. *Texas v. Johnson*, 491 U.S. 397, 414 (1989). "[T]he use of the controversial nature of speech as the effective touchstone for regulation 'threatens a value at the very core of the First Amendment, the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." ' " *U.S. Southwest Africa/Namibia Trade & Cultural Council*, 708 F.2d at 769 (quoting *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 548 n.9 (1980) (Stevens, J., concurring) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964))). An advertisement such as Lebron's

> cannot be prohibited . . . merely because it provokes disagreements and offends the sensibilities of the majority. "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." It is precisely this speech for which the protection of the First Amendment was intended.

Penthouse International, Ltd. v. Koch, 599 F. Supp. 1338, 1350 (S.D.N.Y. 1984) (citation omitted); *see also Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) ("A function of free speech under our system of government is to invite dispute."); *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) ("not free thought for those who agree with us but freedom for the thought that we hate").

If the policy is as set forth in TDI's guidelines, whether for Public Service Advertising or for Commercial Advertising, it is void for the same reason, for these guidelines are designed to ensure against advertising that is controversial, in bad taste, or inconsistent with the taste and preferences of the majority of the community. Such standards are of course permissible for a private actor, but not for a governmental actor or an actor whose symbiotic relationship with government renders the act of regulation governmental. Because Amtrak is saturated with the presence of the federal government, it may not regulate speech in an effort to shield its customers from the abrasive, the obnoxious, the controversial.

Conclusion

Plaintiff Lebron has convincingly demonstrated that in rejecting his contract to display his art on its billboard Amtrak was engaged in governmental action and that the standards employed by Amtrak in rejecting his work violated its obligations under the First Amendment.[12]

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[12] I do not reach Lebron's alternative contract theory because this resolution makes it superfluous.

Defendants are accordingly directed to give plaintiff immediate access to the Spectacular in accordance with his contract.

Dated: New York, N.Y.
February 5, 1993

SO ORDERED:

Pierre N. Leval, U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 93-7127

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of December, one thousand nine hundred and ninety-three.

PRESENT: HON. J. EDWARD LUMBARD,
HON. JON O. NEWMAN,*
HON. J. DANIEL MAHONEY,

Circuit Judges.

MICHAEL A. LEBRON,

Plaintiff-Counter-Defendant-Appellee,

—against—

NATIONAL RAILROAD PASSENGER CORPORATION
(AMTRAK),

Defendant-Appellant,

TRANSPORTATION DISPLAYS, INCORPORATED,

Defendant-Counter-Claimant.

[Filed Dec. 27, 1993]

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* Judge Newman became Chief Judge of the Second Circuit Court of Appeals on July 1, 1993.

ORDER

Appeal from the United States District for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court. Lebron's motion to strike pages from the joint appendix and for double costs and attorney's fees is denied; his motion to file a supplemental volume of exhibits is granted.

GEORGE LANGE III, Clerk
By:

Edward J. Guardaro
Staff Attorney

Supreme Court, U.S.
FILED
APR 28 1994
OFFICE OF THE CLERK

No. 93-1525

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MICHAEL A. LEBRON,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Amtrak—which has been found by this Court to be a "private, for-profit corporation," * and which has been held to be a private actor in *every* case that has addressed the issue—should be treated as a governmental actor, subject to the requirements of the First Amendment, when it engages in the commercial activity of offering advertising space in its railroad stations.

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* *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 454 (1985).

RULE 29.1 LISTING

The National Railroad Passenger Corporation has no parent companies or subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

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MICHAEL A. LEBRON,
Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION
(AMTRAK),
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Michael A. Lebron, commenced this suit against Amtrak, the owner of Pennsylvania Sation in New York, based on Amtrak's refusal to make available a huge, 103-foot long illuminated billboard called "the Spectacular" for the display of an advertisement attacking the political activities of the Coors family, owners of the Coors Brewing Co. Petitioner alleged that Amtrak's refusal to sell him space for the ad was governmental action subject to the requirements of the First Amendment, and that the First Amendment compelled Amtrak to display his political attack ad.

Relying on the "unvarying line of authority" that has held that Amtrak is not a governmental actor for con-

stitutional purposes, the court of appeals correctly held that Amtrak's refusal to run petitioner's advertisement was not equivalent to an act taken by the federal government, and accordingly ordered that petitioner's complaint be dismissed. App. 12a.[1]

A. Background

1. *Amtrak*

In the Rail Passenger Service Act of 1970 (the "Act"), Congress created Amtrak as a private, for-profit corporation, subject to the District of Columbia Business Corporation Act. *See* 45 U.S.C. § 501 *et seq* (1988). The Act explicitly states that Amtrak is "not an agency, instrumentality, authority, or entity, or establishment of the United States Government." *Id.* § 541.

Amtrak's common shares of capital stock are held by four other private railroads: The Grand Trunk Western Railroad Company, Burlington Northern, Inc., Soo Line Railroad Company, and The Penn Central Corporation (which is no longer in business as a railroad). C.A.App. 1173. Preferred shares of Amtrak's stock are held by the United States. *Id.*

The Act provides that Amtrak

> shall be operated and managed as a for profit corporation, the purpose of which shall be to provide intercity and commuter rail passenger service, employing innovative operating and marketing concepts so as to fully develop the potential of modern rail service in meeting the Nation's intercity and commuter passenger transportation requirements.

45 U.S.C. § 541. Like any other for-profit corporation, Amtrak files federal corporate income tax returns with

[1] Citations to App. —— are to the pages of the appendix to the Petition. Citations to C.A.App. ——, E ——, and SE —— are to pages of the following documents in the court of appeals: the joint appendix, the exhibit volumes, and the supplemental exhibit volume.

the United States government. C.A.App. 1173. Amtrak's employees are not on a federal pay scale, and their retirement monies are paid into the Railroad Retirement Fund, as are the monies of all railroad employees. C.A. App. 1174.

Amtrak receives financial subsidies from the federal government, 45 U.S.C. § 601, but those subsidies cover only a fraction of Amtrak's operating expenses and have decreased in recent years. The record showed that Amtrak's grant request to Congress for 1993 anticipated a subsidy reduction from 21 percent to 16-18 percent of its operating expenses, E 2258, and Amtrak strives to reduce subsidies even further, E 2224-2227.

Amtrak's nine-person board of directors is substantially made up of private individuals closely associated with the railroad industry: two board members who are selected by the President from a list submitted by commuter authorities; three additional board members who are selected by the President, each of whom is required by law to be connected to the railroad industry,[2] and no more than two of whom may be registered as members of the same party; two board members who are selected by the preferred stockholder; the Secretary of Transportation; and the President of the Corporation, who is selected by the other board members. 45 U.S.C. § 543.

Amtrak, not the federal government, owns New York City's Penn Station. C.A.App. 1175. In 1976, the station was deeded from the Pennsylvania Tunnel and Terminal Railroad Company, a subsidiary of Penn Central, to Conrail, a private corporation, which then conveyed the property to Amtrak. C.A.App. 1174. The federal

[2] One of these members is selected from a list recommended by the Railway Labor Executives Association, one from among governors of states with an interest in rail transportation, and one "as a representative of business with an interest in rail transportation." 45 U.S.C. § 543(a)(1)(C)(iii).

government holds a mortgage that covers Penn Station. C.A.App. 439.

2. *The Spectacular*

On the west side of the upper level of Penn Station, dominating the main entrance to Amtrak's waiting room and ticket area, is a curved, 103-foot long by 10-foot high illuminated billboard known as "the Spectacular." App. 3a. Amtrak has authorized Transportation Displays, Incorporated ("TDI") to sell advertising space on the Spectacular and at other locations. The contract between Amtrak and TDI expressly provides that "[a]ll advertising material, exhibit material, notices and advertisements and their manner of presentation and design, shall be subject to approval by Amtrak." E 5. Advertising on the Spectacular is overseen by Amtrak's Real Estate and Operations Development Department, which is responsible for all corporate profit-making ventures other than running the railroad. The Vice President for that Department, Anthony DeAngelo, applies Amtrak's advertising policies and makes the final decision whether to approve ads for the Spectacular. C.A.App. 106-08. Anthony DeAngelo is not a public official.

Amtrak has had a long-standing policy prohibiting *all* political advertising on the Spectacular. C.A.App. 107, 365-66, 813-15, 823-24, 844. The policy, in fact, has been in effect since the Spectacular was built in 1967, before Amtrak even existed. C.A.App. 365-66, 813-15; E 192. As Chief Judge Newman, the only member of the panel to address the First Amendment issue, found in his dissent, "Amtrak's billboard space in Pennsylvania Station . . . has not become a forum for ads of such pointed political content as Lebron's attack on the makers of Coors beer for promoting 'The Far Right's political agenda.'" App. 16a.[3]

[3] Petitioner's assertion that Amtrak has "display[ed] other political advertisements in Penn Station," Petition ("Pet.") 2, is completely false. The record shows that Amtrak has always prohibited the display of political ads on the Spectacular and everywhere else in Penn Station. Amtrak has permitted public service ads in Penn Station, but not on the Spectacular.

3. *Amtrak's Rejection of Petitioner's "Advertorial"*

Petitioner's proposed "advertorial," as he calls it, is a photomontage of convivial Coors drinkers, juxtaposed with a scene in which Nicaraguan villagers are menaced by a Coors beer can hurtling toward them like a missile. In addition to its powerful visual image, the "advertorial" contains considerable text, superimposed on an American flag, which is sharply critical of the Coors family's support of "The Far Right's political agenda." App. 5a.[4]

On December 2, 1992, petitioner submitted a color photocopy of his ad to TDI, which TDI forwarded to Amtrak for approval. App. 4a. On December 17, Amtrak's Vice President, Anthony DeAngelo, first learned of petitioner's proposed ad. He immediately rejected it as political. C.A.App. 107-08; *see also* C.A.App. 114, 857-58, 860. In a letter dated December 23, 1992, Amtrak notified TDI of its rejection, invoking its longstanding "policy that it will not allow political advertising on the [S]pectacular advertising sign." App. 5a.

Contrary to petitioner's oft-repeated assertion, *e.g.*, Pet. 6, 16, 22, 24, the record shows that Amtrak's board of directors did not participate in the decision to reject petitioner's advertorial. C.A.App. 355-56, 365, 373-74. Indeed, there is nothing to suggest that the board even knew about the decision or the policy that prompted it. The district court made no such finding, nor could it have done so. The record shows that the *only* relationship between Amtrak's board and any aspect of Amtrak's advertising policies and practices is that the board authorized Anthony DeAngelo to enter into nationwide contracts with TDI to lease ad space, and that several years

[4] The text to petitioner's "advertorial" is reproduced in the Appendix to Brief in Opposition.

earlier the board approved a single long-term lease with A&S department store for the Spectacular. App. 7b; E 400-02.

B. The Decisions Below

Petitioner commenced this action on December 30, 1992, seeking an injunction requiring Amtrak to display his ad. A trial was conducted entirely on documentary submissions—including deposition transcripts, exhibits, stipulations, and admissions derived from each party's "mark-up" of proposed findings of fact submitted by the opposition. C.A.App. 1015-171.

On February 5, 1993, the district court issued an opinion and order directing Amtrak to give petitioner immediate access to the Spectacular. Departing from an unbroken line of precedent from five circuits, the court held that Amtrak is a governmental actor for constitutional purposes. Then, ignoring a decision of this Court that expressly upheld a municipal government's policy of prohibiting political advertising on government property, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the district court ruled that Amtrak's rejection of petitioner's ad violated the First Amendment. App. 4b-21b. A three-judge panel of the court of appeals granted Amtrak a stay pending appeal and ordered the appeal to proceed on an expedited basis. App. 6a.

On December 27, 1993, in an opinion written by Judge Mahoney and joined by Judge Lumbard, the court of appeals reversed, holding that Amtrak was not a governmental actor for constitutional purposes. App. 12a. The court began its analysis by noting that Amtrak is "a private, for-profit corporation under the District of Columbia Business Corporation Act," App. 7a, and that Congress has specified that "Amtrak is 'not . . . an agency, instrumentality, authority, or entity, or establishment of the United States Government,'" *id.* (quoting 45 U.S.C. § 541). The court of appeals noted that the issue

whether Amtrak is a governmental actor was governed by the framework for "discerning the presence of government action in the activities of private entities" set forth by this Court's decisions in *Blum v. Yaretsky*, 457 U.S. 991 (1982), *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). App. 7a-8a.[5]

The court of appeals then looked to the "numerous cases" that, applying this Court's precedents to Amtrak or Conrail, have held that neither is "subject to constitutional constraints upon government action." App. 11a-12a (collecting cases). One such case was the Second Circuit's decision in *Myron v. Consolidated Rail Corp.*, 752 F.2d 50 (2d Cir. 1985), in which the court found that

> despite federal funding, regulation, stock ownership and representation on the board of directors, there is nothing resembling federal supervision of day-to-day activities. In sum, we conclude that despite an obviously close relationship, the federal government has not "so far insinuated itself into a position of interdependence" with Conrail that the latter's personnel decisions can be considered federal action.

Id. at 55-56 (quoting *Burton*, 365 U.S. at 725). The court of appeals held that "[i]n view of this unvarying

[5] Petitioner erroneously contends that the court "pointedly ignored" this Court's *Burton* decision. Pet. 19. The court of appeals explicitly applied *Burton* and this Court's subsequent cases interpreting that decision. Indeed, the court cited *Burton* more times than any other Supreme Court decision. *See* App. 7a-9a. The court of appeals in a footnote did state that "[s]ome commentators have suggested that more recent Supreme Court cases, and especially the Court's ruling . . . in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 542-47 (1987), have curtailed *Burton*'s precedential authority," App. 8a n.1—a fact that petitioner would like to ignore, but that this Court also has acknowledged, *see, e.g., Jackson*, 419 U.S. at 358 ("actual holding" of *Burton* "limit[ed] . . . to lessees of public property"); *see* pp. 17-20, *infra*.

line of authority, and the fact that our pertinent precedent [*Myron*] addressed an issue of First Amendment retaliation . . . we conclude that Amtrak's refusal to run [petitioner's] advertisement on the Spectacular was not governmental action . . . ." App. 12a.

The panel majority did not reach the issue whether Amtrak's advertising policy would have withstood First Amendment scrutiny if Amtrak were considered a governmental actor. Chief Judge Newman in dissent, however, stated that although he believed Amtrak to be a governmental actor, he "would not uphold the District Court's injunction requiring Amtrak to display Lebron's ad." App. 15a-16a. Noting that "Amtrak's billboard space in Pennsylvania Station . . . has not become a forum for ads of such pointed political content as Lebron's attack on the makers of Coors beer for promoting 'The Far Right's political agenda,' " Judge Newman concluded that "it is not an appropriate use of a federal court's equity power to force Amtrak to venture so extensively into the political arena." App. 16a. If Amtrak's policies were shown to be unconstitutionally vague, Judge Newman noted, "damage remedies and declaratory relief [would] have to suffice." *Id.*

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION ACCORDS WITH THE DECISION OF EVERY COURT THAT HAS ADDRESSED THE ISSUE WHETHER AMTRAK IS A GOVERNMENTAL ACTOR

In an effort to argue that this case warrants the Court's attention, petitioner struggles to create the appearance that the court of appeals' holding conflicts with decisions from other circuits. In fact, there is no conflict. *Every single court that has addressed the question whether Amtrak or Conrail is a federal actor for constitutional purposes has concluded that they are not. See Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 681-83 (7th Cir. 1987) (Conrail not a governmental actor); *G & T Terminal Packaging Co. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1236 (3d Cir. 1987) ("Every court that has considered the matter has concluded that Conrail is not a governmental actor for purposes of constitutional analysis."), *cert. denied*, 485 U.S. 988 (1988); *Morin v. Consolidated Rail Corp.*, 810 F.2d 720, 722-23 (7th Cir. 1987) (Conrail not a governmental actor); *Anderson v. National Railroad Passenger Corp.*, 754 F.2d 202, 204 (7th Cir. 1984) ("The ties between Amtrak and the federal government do not warrant a finding of governmental action for purposes of the fifth amendment."); *Myron v. Consolidated Rail Corp.*, 752 F.2d 50 (2d Cir. 1985) (Conrail not a governmental actor); *Wilson v. National Railroad Passenger Corp.*, 824 F. Supp. 55, 57-58 (D. Md. 1992) (Amtrak not a governmental actor); *Railway Labor Executives Assn. v. National Railroad Passenger Corp.*, 691 F. Supp. 1516, 1524 n.11 (D.D.C. 1988) ("[Plaintiffs] claim Amtrak is a governmental enterprise because it was created by Congress and relies heavily on federal funds. This argument has been uniformly rejected by federal courts and this Court concurs in their analysis."); *Marcucci v. National Railroad Passenger Corp.*, 589 F. Supp. 725, 727-29 (N.D. Ill. 1984) (Amtrak not a governmental actor); *Kimbrough v. National Railroad*

Passenger Corp., 549 F. Supp. 169, 172-73 (M.D. Ala. 1982) (Amtrak not a governmental actor); *Moorhead v. National Railroad Passenger Corp.*, No. 81-1579, slip op. at 3-4 (D.D.C. Mar. 9, 1982) (Amtrak not a governmental actor); *see also Ehm v. National Railroad Passenger Corp.*, 732 F.2d 1250 (5th Cir.), *cert. denied*, 469 U.S. 982 (1984) (Amtrak not subject to Privacy Act).[6]

Thus, this case does not present a conflict among the circuits. There is unanimity among the courts on the only matter decided by the court of appeals: Amtrak is not a federal actor for purposes of constitutional analysis.

Unable to show that the holding of the court of appeals conflicts with the holding in any other case, petitioner argues that the reasoning employed by the court of appeals in this case, as well as the reasoning employed by all the other courts that reached the same result, is somehow inconsistent with the reasoning employed by other

[6] Petitioner contends that the cases holding that Conrail is not a governmental actor are distinguishable from the present case because Conrail and Amtrak are "very different entit[ies]." Pet. 24. For example, petitioner asserts that "Conrail's only government 'support' was in the form of government loans and investments" and that it "never received direct government subsidies." Pet. 24. Petitioner is just plain wrong. The government purchased billions of dollars of property on behalf of Conrail. Indeed, the $2.113 billion worth of property acquired by the government to which petitioner refers, Pet. 4-5, consists of 19,000 miles of rail lines and related propertly (including Penn Station) *that the government purchased for Conrail, not Amtrak. See* SE 2411-12. Conrail then conveyed a small portion of these properties (the Northeast Corridor line) to Amtrak. SE 2411. And in consideration for the appropriations it receives, Amtrak, like Conrail, issues preferred stock and notes to the federal government. *See* 45 U.S.C. § 544(c); *id.* § 854(e). Even the district court in this case acknowledged that Conrail and Amtrak are "similarly structured" for purposes of governmental action analysis, *see* App. 10b, as has every other court that has addressed this issue, *see, e.g., Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 683 (7th Cir. 1987); *Morin v. Consolidated Rail Corp.*, 810 F.2d 720, 722-23 (7th Cir. 1987).

courts of appeals in cases presenting different sets of facts. Petitioner's arguments, however, are premised upon misstatements of the court of appeals' reasoning and of the other courts' decisions.

Petitioner first contends that contrary to four other circuit courts, the court of appeals required petitioner to satisfy a more rigorous standard for finding governmental action because petitioner asserted a First Amendment claim rather than a claim of racial discrimination. Pet. 13-16. The court of appeals did no such thing.

The court of appeals based its holding that Amtrak was a private actor on (i) this Court's decisions in *Blum*, *Jackson*, and *Burton*, (ii) the Second Circuit's decision in *Myron*, and (iii) the "unvarying line of authority" from other circuits. *See* App. 7a-12a. Of these cases, *Burton* involved a claim of racial discrimination, *Blum* and *Jackson* involved Due Process claims, and Myron involved a First Amendment claim. There is no indication that the court of appeals treated any of these precedents differently because they involved different constitutional claims. Indeed, the *Myron* decision, which the court of appeals found to "provide strong guidance, if not controlling authority, for our decision in this First Amendment case," App. 10a, explicitly relied upon this Court's decision in *Burton*, a racial discrimination case, *see Myron*, 752 F.2d at 55-56. Thus, petitioner's suggestion that the court of appeals found Amtrak not to be a governmental actor because petitioner asserted a First Amendment claim, rather than a claim of racial discrimination, is entirely without merit.[7]

[7] The district court erroneously stated, without citation, that during oral argument Amtrak "conceded . . . that . . . it would be deemed a governmental actor" if it restricted service on the basis of race, religion, or national origin. App. 11b. In fact, when asked whether it would be a state actor if petitioner "[w]as denied services based on race or denied access to the billboard based on race," Amtrak's counsel responded: "No. I don't think under either situation . . . ." C.A.App. 1108. Asked a second time if

Petitioner next attempts to create the appearance of a circuit conflict by arguing that in cases involving entities other than Amtrak or Conrail, several courts of appeals have found the presence of federal appointees on the defendant's board of directors alone sufficient to "render[] an otherwise private entity a state actor." Pet. 16. Petitioner mischaracterizes the law of the other circuits.

Petitioner cites three Sixth Circuit decisions—the most recent of which is more than 20 years old—as evidence of a claimed "conflict." Pet. 17 & n.8 (citing *O'Neill v. Grayson County War Memorial Hosp.*, 472 F.2d 1140, 1143 (6th Cir. 1973); *Chiaffitelli v. Dettmer Hosp. Inc.*, 437 F.2d 429, 430 (6th Cir. 1971); *Meredith v. Allen County War Memorial Hosp. Commn.*, 397 F.2d 33, 35 (6th Cir. 1968)). What petitioner fails to acknowledge is that *the Sixth Circuit has expressly repudiated the reasoning of these cases in light of this Court's more recent government action decisions.* Thus, the Sixth Circuit in *Crowder v. Conlan*, 740 F.2d 447 (6th Cir. 1984), noting that members of the defendant's board of directors were public officials, held that

> [a]lthough it is true that this court has found "state action" in similar circumstances, *see O'Neill v. Grayson County War Memorial Hosp.*, 472 F.2d 1140, 1143 (6th Cir. 1973); *Chiaffitelli v. Dettmer Hospital Inc.*, 437 F.2d 429, 430 (6th Cir. 1971) (per curiam); *Meredith v. Allen County War Memorial Hosp. Comm'n*, 397 F.2d 33, 35 (6th Cir. 1968), *we believe the legal reasoning of these cases is no longer valid in light of the Supreme Court's recent holdings in this area of law.* Rather than looking to the number of public officials who serve on the governing board of a private institution, we believe the proper focus concerns whether the State has exercised "coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."

740 F.2d at 451 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). Similarly, in *Adams v. Vandemark*, 855 F.2d 312, 317 (6th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989), the Sixth Circuit—citing the Seventh Circuit's holding in *Anderson v. National Railroad Passenger Corp., supra*, that Amtrak is not a governmental actor—found the defendant not to be a governmental actor despite public representation on its board of directors.

Petitioner also cites *Foster v. Ripley*, 645 F.2d 1142 (D.C. Cir. 1981), as evidence of an alleged circuit split on the relevancy of federal appointees on an entity's board. Pet. 17. But *Foster* did not involve facts at all similar to those present here. First, in that case, a majority of the members of the defendant's board were public officials. *See* 645 F.2d at 1147. By contrast, only one of Amtrak's nine board members is a public official. *See* 45 U.S.C. § 543. Second, the public officials in *Foster* specifically approved the challenged action, *see* 645 F.2d at 1147, whereas here there is no evidence that Amtrak's board played any role in creating or implementing Amtrak's advertising policies—let alone in rejecting petitioner's ad. Finally, the court of appeals in *Foster* cited numerous other indicia of governmental action apart from the composition of the defendant's board, none of which is applicable to Amtrak:

> Over 90 percent of [Smithsonian Science Information Exchange's] budget originates from federal appropriations or contracts, the SSIE is treated by the Smithsonian [a government agency] and held out to the public as one of its bureaus, and the Smithsonian handles its accounting, personnel, payroll, audit, legal, fiscal, and procurement services and its requests to the Congress for appropriations. Indeed, the SSIE is close in character to a federal agency or depart-

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it would not be state action to deny access to the Spectacular "to black people," Amtrak's counsel responded again: "That would not be state action . . . [i]t would not be a state actor." *Id.*

ment; it is essentially an operating branch of the federal government.

Id.[8]

Foster certainly has not been regarded as compelling a conclusion that Amtrak is a governmental actor. Judge Lumbard, who wrote the *Foster* opinion, joined the decision below holding that Amtrak is not a governmental actor. And since the D.C. Circuit decided *Foster*, two district courts in that circuit have held that Amtrak is not a federal actor for constitutional purposes. *See Railway Labor Executives Assn. v. National Railroad Passenger Corp.*, 691 F. Supp. 1516, 1524 n.11 (D.D.C. 1988); *Moorhead v. National Railroad Passenger Corp.*, No. 81-1579, slip op. at 3-4 (D.D.C. Mar. 9, 1982).[9]

Finally, petitioner cites a number of decisions from other circuits that he claims "found government control of an entity's Board to be virtually sufficient in itself to establish state action." Pet. 17. That is a gross distortion of the holdings in these cases. In *Milo v. Cushing Municipal Hospital*, 861 F.2d 1194 (10th Cir. 1988), the court found the defendant to be a "public institution," *id.* at 1197, and explicitly stated that it was not deciding "whether the activity of a nominally private entity constituted state action," *id.* at 1195. There is no question that Amtrak is not a "public institution." *See, e.g., National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 454 (1985). In *Gilmore v. Salt Lake Community Action Program*, 710 F.2d 632, 637 n.12 (10th Cir. 1983), the court emphatically stated that "we do not find the presence of public officials on the board sufficient to support a finding of state action" and went on to hold that the challenged decision was not state action. And in *Downs v. Sawtelle*, 575 F.2d 1 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978), the court cited the presence of public officials on the defendant's board as only one of many factors supporting its finding of state action. With respect to the significance of the defendant's board members, the *Downs* court relied upon *Jackson v. Statler Foundation*, 496 F.2d 623 (2d Cir. 1974), and the three Sixth Circuit cases cited by petitioner. As already noted, the Sixth Circuit cases petitioner cites are no longer regarded as good law by that court. And the Second Circuit obviously did not regard its prior decision in *Jackson* as requiring a finding that Amtrak is a governmental actor.

In sum, the holding of the court of appeals, as well as the court's reasoning, comports with the decisions of the other circuits.

II. THE COURT OF APPEALS' DECISION ACCORDS WITH THE DECISIONS OF THIS COURT

Petitioner also suggests that the decision of the court of appeals—as well as the decision of every other court that has addressed the issue of Amtrak's status—conflicts with this Court's precedents. Once again, petitioner's "conflict" is cut out of whole cloth.

In *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co., supra*, this Court characterized Amtrak as a "private, for-profit corporation," and held that its actions are not equivalent to those of the federal government. 470 U.S. at 454, 470-71. In that case, Amtrak had entered into certain "Basic Agree-

[8] The facts of *McVarish v. Mid-Nebraska Community Mental Health Center*, 696 F.2d 69 (8th Cir. 1982), which petitioner also cites, are equally dissimilar to those of the present case. In *McVarish*, the court found that the defendant "acted as an arm of twelve counties." *Id.* at 71. Moreover, the defendant's board, which was comprised of public officials or their designees, actually made the decision the plaintiff challenged. *Id.*

[9] It is worth noting that like each of the cases petitioner cites from the Sixth Circuit, the *Foster* decision predates this Court's more recent state action decisions in *Blum v. Yaretsky, supra*, *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), and *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987).

ments" with other private railroads, pursuant to which Amtrak relieved the railroads of their common carrier obligations. The railroads subsequently argued that the Basic Agreements constituted contractual obligations of the United States. This Court disagreed, finding that the agreements "are contracts not between the railroads and the United States but simply between the railroads and the non-governmental corporation, Amtrak." *Id.* at 470.

Petitioner's contention that this Court's precedents somehow transform this "private, for-profit corporation" into a federal actor is without merit. In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), this Court summarized the basic test for determining whether governmental action exists in cases such as this:

> Most fundamentally, this Court has held that a government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." 483 U.S. at 546 (quoting *Blum*, 457 U.S. at 1004).

Neither Amtrak's prohibition against political advertising in general nor its application of that prohibition to petitioner's "advertorial" satisfies this test. No federal regulation compelled or influenced these decisions. Indeed, there are no federal regulations that even apply to Amtrak's advertising. Moreover, no federal official "exercised coercive power" or provided "significant encouragement" in the formulation of Amtrak's advertising policy or Amtrak's rejection of petitioner's ad. The policy petitioner challenges originated with Amtrak's predecessor, the Pennsylvania Railroad Company, before Amtrak was even created. E 192. The policy has been applied by Amtrak's Real Estate Department, whose Vice President, Anthony DeAngelo, made the decision to reject petitioner's ad. The federal government simply played no role whatsoever in these decisions.[10]

Petitioner argues that this Court's decision in *Burton v. Wilmington Parking Authority, supra*—a 33 year-old decision that was expressly limited to a narrow set of facts not present here—requires a finding that the federal government is a "joint participant" in Amtrak's sale of advertising space. But that argument is entirely without merit.

In *Burton*, this Court found state action in the exclusion of black citizens from a restaurant that leased space in a building that was built, owned and maintained by the State, and used primarily to house a public parking garage. 365 U.S. at 723-25. Noting that "no state may effectively abdicate its responsibilit[y]" to avoid the "grave injustice" of excluding black citizens from a "public building," *id.* at 724-25, the Court reasoned: "By its inaction, the [Parking] Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination," *id.* at 725. And emphasizing that the "profits earned by discrimination [in

[10] Petitioner suggests that the federal government had involvement in these decisions through the actions of Amtrak's board. But there is no evidence that Amtrak's board had any involvement in the formulation of Amtrak's policy against political advertising on the Spectacular, or in Amtrak's rejection of petitioner's political ad. Petitioner's argument that it did is without the slightest support in the record. Moreover, only one of Amtrak's board members, the Secretary of Transportation, is a federal official. Although five of the nine board members are appointed by the President, they are selected from a list submitted by commuter authorities or connected with the railroad industry. *See* p. 3, *supra*. This Court has held that the similarly structured "Conrail is not a federal instrumentality by reason of the federal representation on its board of directors," reasoning that "[t]he responsibilities of the federal directors are not different from those of the other directors —to operate Conrail at a profit for the benefit of its shareholders." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 152 (1974).

the restaurant] not only contribute to, but also are indispensable elements in, the financial success of [the] governmental agency" that owned the building and operated the parking garage, *id.* at 724, the Court concluded: "The State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity," *id.* at 725.

This Court in *Burton* was careful to "[s]pecifically defin[e] the limits" of its holding: "what we hold today is that when a State *leases* public property *in the manner* and *for the purpose* shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." *Id.* at 726 (emphasis added). Obviously that holding has no applicability here.

Petitioner argues that the holding in *Burton* should be extended to cover this case—in effect, that *Burton* should be construed to mandate a finding of governmental action whenever the government and a private actor are in a position of "interdependence," or when a "symbiotlic relationship" can be said to exist between the government and a private actor. But that argument not only lacks support in the decisions of the courts of appeals, it also ignores the cases in which this Court has repeated declined to extend the holding in *Burton* to a variety of relationships between government and private entities involving a much greater degree of "interdependence" than is present here. For example, in *Blum v. Yaretsky, supra,* this Court declined to extend *Burton* to the actions of nursing homes in transferring state Medicaid patients to different, less expensive facilities, despite extensive evidence of interdependence: (1) the nursing homes were dependent on the State for subsidization of their operating and capital costs and for payment of the medical expenses of more than 90 percent of their patients, 457 U.S. at 1011; (2) the State was dependent upon the

nursing homes to care for its Medicaid patients and to carry out its Medicaid program; (3) the State benefitted financially and directly from the transfers at issue—and, in fact, encouraged such transfers, when appropriate, precisely to save money, *id.* at 1007-08, 1009-10; *see Rendell-Baker v. Kohn,* 457 U.S. 830, 841 (1982); and (4) the nursing homes were "extensively regulated" by the State, 457 U.S. at 1004. Notwithstanding these facts showing what was literally a symbiotic relationship, this Court rejected the plaintiff's "rather vague generalization," supported by citation to *Burton,* "that such a relationship exists between the State and the nursing homes it regulates that the State may be considered a joint participant in the homes' discharge and transfer of Medicaid patients." 457 U.S. at 1010-11.

Similarly, in *Rendell-Baker v. Kohn, supra,* this Court refused to extend *Burton* to the actions of a private school that contracted with the State to provide special education to public school students, again despite substantial evidence of interdependence between the school and the State: (1) the school depended on the State each year for at last 90 percent, and in one year 99 percent, of its operating budget, 457 U.S. at 832; (2) "nearly all of the students at the school [were] referred" by the State, *id.*; (3) the State depended on the school to "provide[] a service that the State [was] required to provide" under state law, *id.* at 849 (Marshall, J., dissenting); and (4) the school was extensively regulated, *id.* at 841. Those facts, the Court concluded, did not render the school a governmental actor for constitutional purposes.

Finally, in *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., supra,* this Court strongly indicated that interdependence does not itself support a finding of governmental action absent evidence that the government exercised "coercive power" or provided "significant encouragement" with respect to the challenged decision. In that case, the Court rejected petitioner's argument that the United States Olympic Committee (the

"USOC")—which like Amtrak is a private corporation established pursuant to an Act of Congress—was a governmental actor under the analysis of *Burton*. 483 U.S. at 542-47. Petitioner, and Justice Brennan in dissent, asserted that the USOC was a federal actor because Congress (1) granted the USOC its corporate charter, (2) "gave the USOC authority and responsibility that no private organization in this country had ever held," 483 U.S. at 557 (Brennan, J., dissenting), and (3) "conferred substantial financial resources on the USOC, authorizing it to seek up to $16 million annually in grants from the Secretary of Commerce, and affording it unprecedented use of the word 'Olympic' and related emblems to raise additional funds," *id.* (Brennan, J., dissenting) (citations omitted).[11] Notwithstanding the evidence of a symbiotic relationship, the Court held that the USOC was a private actor, because the petitioner had "failed to demonstrate that the Federal Government can or does exert any influence over the exercise of the USOC's enforcement decisions." *Id.* at 547 n.29. The Court held that "[*a*]*bsent proof of this type of 'close nexus between the* [*Government*] *and the challenged action of the* [*USOC*],' the challenged action may not be 'fairly treated as that of the [Government] itself." *Id.* (emphasis added; citation omitted). As already demonstrated, there is no such nexus between the federal government and Amtrak's decision to reject petitioner's "advertorial."

In short, neither this Court's holding in *Burton* nor its subsequent decisions lend any support to petitioner's argument that Amtrak is a governmental actor. To the contrary, the Court's more recent decisions reinforce the

[11] The federal government also received substantial benefits from the relationship. In exchange for providing the USOC with funding and "traditional governmental powers," the USOC "serve[s] [the] national interest" by "correct[ing] the disorganization and serious factional disputes that seemed to plague amateur sports" and by "represent[ing] th[e] Nation to the world community." 483 U.S. at 544-51.

correctness of the unanimous decisions of numerous courts that Amtrak is not a governmental actor for constitutional purposes.

CONCLUSION

The court of appeals' decision does not conflict with any decision of this Court or of any court of appeals. Instead, the court of appeals simply found what every other court has found when presented with the same issue: the federal government is not sufficiently intertwined with Amtrak's day-to-day affairs that Amtrak's decisions must be deemed to be those of the government. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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April 28, 1994

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APPENDIX

APPENDIX

After a hard week's work, you're ready for the right place with the right one. Why make the right moment the right's moment? Coors Light not only has the taste that won't slow you down. It's the Silver Bullet that aims the Far Right's political agenda at the heart of America. Want the awesome facts? Then read between these lines.

Every year, the Coors family, owners of Coors Brewing Co., gives financial support to groups like The National Forum Foundation, Morality in Media, The Heritage Foundation and The Free Congress Foundation. They form part of a network that includes authoritarian religious and political extremists. When you buy Coors products, you help them turn back civil rights, censure [sic] high school textbooks, weaken labor laws and environmental protections, promote homophobia, and meddle in foreign affairs. Did you know Joe Coors himself bought an aircraft for the Nicaraguan contras?

Where are the Nicaraguan contras today? El Loco says "Once, we were glad to have Joe Coors and his friends on our side. Together, we fought the hard and dirty fight that drove Nicaraguans to the voting booth to make The Right's Choice for a Better Nicaragua! Now the shooting war is over; after 30,000 dead, I can walk into my favorite Managua bar and say, 'No more of that industrial strength Nicaraguan cervesa for me. Gimme the great taste of Coors Light!' But my family, and Nicaraguan families everywhere, are poorer than ever. With 55% unemployed, we scour garbage heaps for food in the villages we ravaged. What happened to all that promised U.S. aid? What does it really mean to say that Coors Light is The Right's Beer now?"

E 2210-18 (footnotes omitted).

No. 93-1525

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MICHAEL A. LEBRON,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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REPLY MEMORANDUM FOR PETITIONER

In its brief in opposition, the National Railroad Passenger Corporation ("Amtrak") seeks to paint this case as just another in a long line of cases finding that Amtrak and Conrail are not state actors for purposes of routine personnel decisions. But those cases challenged decisions made without the involvement of government appointees. Mr. Lebron challenges a policy suppressing political speech that was expressly adopted by government appointees. In its effort to shoehorn this case into the line of employment decisions, Amtrak repeatedly misrepresents a critical fact: the policy challenged here was adopted by Amtrak's Board, eight of whose nine members are Presidential appointees. When that fact is considered, the court of appeals' decision is revealed to be not in line with the prior employment cases, but out of line with fundamental state action principles: it treats the conduct of direct government appointees as non-state action.

In addition, Amtrak misrepresents the rationale of the court of appeals in an attempt to sidestep two significant inter-circuit conflicts. The Second Circuit could not have reached the result it did in this case—holding that a policy adopted by government appointees is not state action—without applying a higher state action threshold to First Amendment claims, a double standard rejected by other circuits. And its holding is also contrary to those circuits that have held that action taken by a Board controlled by a majority of government appointees is state action.

I. THE FACT THAT AMTRAK'S GOVERNMENT-APPOINTED BOARD EXPRESSLY APPROVED THE POLICY AT ISSUE IN THIS CASE DISTINGUISHES THIS CASE FROM ALL OTHER AMTRAK AND CONRAIL CASES

The most significant (and oft-repeated) misrepresentation in Amtrak's brief is its contention that Amtrak's government-appointed Board played no role in the policy challenged here. For example, Amtrak states that "there is no evidence that Amtrak's board had any involvement in the formulation of Amtrak's policy against political advertising on the Spectacular. . . . Petitioner's argument that it did is without the slightest support in the record."[1] That contention is necessary to Amtrak's argument that this case is indistinguishable from the Amtrak and Conrail employment cases, because those cases emphasized that government appointees had no responsibility for the challenged personnel decisions.[2]

[1] Br. in Opp. 17 n.10; *see also id.* at 5 ("there is nothing to suggest that the board even knew about the decision or the policy that prompted it"); *id.* at 13 ("there is no evidence that Amtrak's board played any role in creating or implementing Amtrak's advertising policies"); *id.* at 17 ("The federal government simply played no role whatsoever in these decisions.").

[2] *See, e.g. Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 54 (2d Cir. 1985) (despite government involvement with Conrail, "there is nothing resembling federal supervision of day-to-day activities . . . so that its personnel decisions can be considered federal action"); *Anderson v. National R.R. Passenger Corp. (Amtrak)*, 754 F.2d 202, 204 (7th Cir. 1985) ("no allegation that the government is involved with Amtrak's personnel policies or decisions"); *Marcucci v. National R. R. Passenger Corp.*, 589 F. Supp. 725, 728 and n.3 (N.D. Ill. 1984) ("no [federal] regulation or policy [ ] could have caused [plaintiff's dismissal]").

In fact, however, the record demonstrates that Amtrak's Presidentially-appointed Board explicitly adopted the policy against political advertising at issue here. The policy that Amtrak's Anthony DeAngelo relied upon in rejecting Mr. Lebron's advertisement—and which the district court struck down—was expressly adopted by Amtrak's Board in 1980 (C.A. App. 345; DeAngelo Dep. 104-05; E31). That policy, contained in a leasing contract with Amtrak's leasing agent, barred advertising that

> in [Amtrak's] judgment, may be unlawful, immoral, improper or offensive to good taste, . . . or involve political or other views which could result in dissension or involve [Amtrak] in dissension, complaints or controversy with its patrons or the public or involve matters or ramifications not now anticipated or foreseeable.

(E31; E42, ¶ 27). In 1985 and 1991, the Board approved even broader contract language authorizing Amtrak to disapprove any advertising that "may be considered objectionable by Amtrak" (C.A. App. 345; DeAngelo Dep. 104-05; E2; E5, § 6, E13, § 31; E19-20, §§ 4, 7; E444-45; E1039-45), but DeAngelo testified that the policy adopted in 1980 continued to apply and formed the basis for his decision in Mr. Lebron's case (C.A. App. 107, 345, 349-50, 383, 407).[3] Thus, contrary to respondent's contention, the record unequivocally shows

[3] DeAngelo stated that the standards applied were "contained in the arrangements we have with TDI and there has [sic] been several of those over the years and it would be the language stated in there." C.A. App. 350. According to DeAngelo, those standards called for advertising that was "not pornographic, and not objectionable to our riding public and others associated with us including political and other types of potentially controversial matters" (C.A. App. 349).

that the Board itself expressly adopted the policy challenged here.

The fact that Amtrak's Board—eight of whose nine members are Presidential appointees[4]—adopted the challenged policy distinguishes this case from every other Amtrak or Conrail state action case cited by respondent. Those cases simply hold that where government appointees are not involved in challenged conduct, the conduct is not state action. Thus, for example, in *Myron v. Consolidated Rail Corp.*, 752 F.2d 50 (2d Cir. 1985), the Second Circuit stressed that Conrail's Board was *not* involved in the employment dispute at issue, and in any event consisted of a majority of non-government appointees. *Id.* at 54. It is one thing to say that a routine personnel decision, made without any input from government appointees, is not state action. It is another matter entirely to hold that a policy expressly adopted by Presidential appointees is not state action.

Amtrak's misrepresentations regarding the Board's makeup and responsibility for the policy are also necessary to its argument that the court of appeals' decision is consistent with this Court's decisions in *Blum v. Yaretsky*, 457 U.S. 991 (1982), *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), and *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987). *Blum* and *Rendell-Baker* held that independent contractors are not state actors simply because they do a lot of business with the government and are subject to

[4] Amtrak also misrepresents the extent of government control of its Board. It inexplicably claims that only "five of the nine board members are appointed by the President," Br. in Opp. 17 n.10. By statute, however, the President appoints eight of the nine members, and the ninth is selected by the eight Presidential appointees. 45 U.S.C. § 543. Respondent attempts to mask this reality by noting, for example, that "two board members are selected by the preferred stockholder," Br. in Opp. 3, but it does not dispute that the only preferred stockholder is the United States, *id.* at 2. Amtrak also argues that several Board members are "private individuals closely associated with the railroad industry," Br. in Opp. 3, but that does not diminish the significant fact that they owe their appointment and allegiance directly to the President of the United States.

general government regulations. But the hospital in *Blum* and the school in *Rendell-Baker* were indisputably private entities—unlike Amtrak, the government did not wholly own their voting stock, appoint their boards, control the disposition of their property, or directly subsidize their losses. Had the government exercised such control, *Blum* and *Rendell-Baker* would undoubtedly have come out differently.

Similarly, as noted in Mr. Lebron's petition, the Court in *San Francisco Arts & Athletics, Inc.* explicitly justified its decision by noting the absence of *any* government control over the United States Olympic Committee's decisions. Pet. 21-22. Here, by contrast, government appointees adopted the very policy Mr. Lebron challenges. This Court has never held that a government appointee's conduct is not state action.

Thus, Amtrak's brief in opposition is predicated on a central misrepresentation of fact concerning the Board and its direct responsibility for the policy challenged here. The court of appeals' holding that a policy adopted by a Board of Presidential appointees is not state action is flatly inconsistent with this Court's precedents and the decisions of several other circuits.[5]

[5] *See infra* Section III. Amtrak's brief contains several other significant misrepresentations. For example, it labels as "completely false" Mr. Lebron's assertion that Amtrak has displayed other political advertisements in Penn Station. Br. in Opp. 4 n.3. But it is undisputed that immediately in front of the Spectacular stands an advertisement for *Plain Truth* magazine, a free fundamentalist magazine that addresses political and social issues—including homosexuality, the holocaust, and the rise of the European Community—from a conservative religious perspective. Pet. 20b; C.A. App. 634-35, 995-97; E346; E202-35; E1144-75; Haut Dep. 56.

In addition, respondent asserts that "Amtrak, not the federal government, owns New York City's Penn Station." Br. in Opp. 3. But it is undisputed that the government-appointed Board controls all disposition of Amtrak's property, including Penn Station. C.A. App. 345. In addition, the federal government purchased Penn Station for Amtrak, and holds the mortgage on it. Pet. App. 9b; SE2407, SE2419; E425; E453-54; E472; E958-66.

II. AMTRAK CONCEDES THAT THERE IS A SPLIT IN THE CIRCUITS ON WHETHER A HIGHER STATE ACTION THRESHOLD MUST BE MET FOR FIRST AMENDMENT THAN FOR EQUAL PROTECTION CLAIMS

Amtrak does not deny that there is a genuine split in the circuits regarding whether the same state action analysis applies to First Amendment and Equal Protection claims. Nor does it dispute that the Second Circuit stated in this case that a stronger state action showing is required for First Amendment claims. It also does not dispute that the Second Circuit's double standard is the minority view, contrary to explicit holdings of four circuits and implicitly contrary to the analysis used by five other circuits and this Court. Instead, Amtrak argues that the court of appeals' decision did not rest on the reasoning the court expressly put forward as a justification for its decision. Br. in Opp. 11.

Amtrak's contention is belied by the court of appeals' own language. In the middle of explaining its reversal of the district court's state action finding, the court held that "a less stringent standard for finding state action should be applied when racial or sexual discrimination is at issue, as is so often the case in employment litigation, than when there is a claim of a First Amendment violation." Pet. App. 10a. That holding was critical to the panel majority's rejection of then-District Judge Leval's (and dissenting Circuit Judge Newman's) conclusion that the Amtrak employment cases were distinguishable because they did not implicate the kind of First Amendment concerns raised by suppressing political expression in Penn Station. The court reasoned that because in its view less state involvement need be shown for a discrimination claim, the fact that employment discrimination claims against Amtrak did not satisfy state action meant *a fortiori* that Mr. Lebron's First Amendment claim could not satisfy state action. *Id.*

Application of this higher state action threshold was critical to the panel's result, because under controlling Second

Circuit precedent, the facts presented in this case would have been sufficient to establish state action in a race discrimination case. In *Jackson v. Statler Found.*, 496 F.2d 623, 634-35 (2d Cir. 1974), the court held that government appointment of a majority of an entity's board, with any other significant evidence of state action, would warrant a finding of state action *where the less stringent state action standard applicable to discrimination claims applied.* The evidence of state action here includes not only majority control of the Board, but sole ownership of voting stock, 24 years of direct federal subsidies of Amtrak's operating expenses, government purchase of the property in dispute, and intermingling of the property with numerous other government entities. Thus, the court of appeals' decision can be squared with its own decision in *Jackson only* by virtue of the higher state action showing it required for Mr. Lebron's First Amendment claim.

The court of appeals' holding therefore rests squarely on a state action analysis that expressly conflicts with four circuits and implicitly conflicts with the state action analysis used by this Court and five other circuits.

III. AMTRAK'S BRIEF UNDERSCORES THE CONFUSION IN THE LOWER COURTS REGARDING THE SIGNIFICANCE OF GOVERNMENT APPOINTMENT OF AN ENTITY'S BOARD TO STATE ACTION ANALYSIS

Amtrak maintains that the second split in the circuits that Mr. Lebron identified—regarding the significance of government control of an entity's Board to the state action inquiry—is based on a "mischaracteriz[ation of] the law of the other circuits." Br. in Opp. 12. If anyone is guilty of mischaracterization on this issue, it is Amtrak. In fact, the cases demonstrate not only a split, but utter confusion among the lower courts.

Amtrak argues that the Sixth Circuit has rejected its own earlier view that the presence of a majority of governmental appointees on an entity's Board establishes state action, cit-

ing *Crowder v. Conlan*, 740 F.2d 447 (6th Cir. 1984). Br. in Opp. 12-13. But Amtrak overstates *Crowder*'s holding. In that case, a doctor challenged a private hospital's decision to restrict his staff privileges. The hospital's 13-member board included two government officials and eleven private members. While the court stated that the "legal reasoning" of three earlier cases finding state action based on government appointment of board members "is no longer valid in light of the Supreme Court's recent holdings," 740 F.2d at 452, it did *not* hold that government appointment of a *majority* of a private entity's board is irrelevant. Instead, it expressly distinguished the earlier cases by noting that "in each of those cases a majority of the members of the hospital's governing board were accountable to the public," whereas in *Crowder*, only a small minority (two) of the thirteen board members "were responsible to the public." *Id.* Moreover, the Court expressly stated that government representation on the board was "an important factor in establishing state action," and cited with approval *Downs v. Sawtelle*, 574 F.2d 1, 8 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978), which found state action where the town appointed all of a hospital's board of directors. *Id.* at 451.[6]

Thus, the Sixth Circuit itself seems confused regarding the significance of government appointment of the members of a private entity's board. As noted in Mr. Lebron's petition, the confusion is even greater across the circuits. Pet. 16-18. Yet

[6] *See also Adams v. Vandemark*, 855 F.2d 312, 317 (6th Cir. 1988) (stating that "[p]erhaps the strongest indication of a symbiotic relationship between [a private corporation] and [a city] is that state law requires one-third of [the corporation's] board of directors to be public officials," but finding no state action where board not involved in challenged personnel decision), *cert. denied*, 488 U.S. 1042 (1989).

The Sixth Circuit in *Crowder* also relied on the fact that the challenged restriction of privileges was in fact the decision of four private medical committees, and not an independent decision of the board. *Id.* at 451-452. Here, by contrast, the Board has exclusive authority over disposition of Amtrak property, and explicitly adopted the policy against political advertising that Lebron challenges.

we are aware of *no* other decision in which any court has found that an entity whose board is comprised of a majority of governmental appointees is not a state actor for purposes of a direct challenge to a policy adopted by the government-appointed board.

* * *

The court of appeals' decision here—holding that a policy expressly adopted by a board whose members are virtually all government appointees is not state action where challenged on First Amendment grounds—goes beyond any other previous state action decision of this Court or any other circuit. It cannot be squared with the prior Amtrak cases, which all emphasized the *absence* of government appointees' involvement in the challenged decisions. Its express reasoning conflicts with the prevailing view in this Court and most of the circuits that the same state action analysis applies to First Amendment and Equal Protection Clause claims. And it conflicts with the decisions of those circuits that have found government appointment of a majority of a board to be a significant or determinative factor in the state action inquiry.

If the court of appeals' decision is correct, Amtrak's Presidentially-appointed Board is free as a constitutional matter to decide that it will sell its valuable advertising space only to contributors to the Democratic Party, or only to advertisers who espouse conservative viewpoints (such as *Plain Truth* magazine). If the court of appeals' decision is correct, a hospital board controlled by government appointees would be constitutionally free to refuse to hire doctors and nurses who advocate a pro-life position on their private time. In short, if the court of appeals' decision is correct, government can immunize its speech-suppressive actions from First Amendment review simply by laundering them through the shell of a "private" corporation whose board and voting stock are controlled by government.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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May 2, 1994

No. 93-1525

Supreme Court, U.S.
FILED
JUL 25 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL A. LEBRON,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX
(Pages J.A. 1 to 199)

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JOINT APPENDIX
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The following opinions and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

	PAGE
Opinion of the United States Court of Appeals for the Second Circuit, dated December 27, 1993	1a
Opinion and Order of the United States District Court for the Southern District of New York, dated February 5, 1993	1b
Order of the United States Court of Appeals for the Second Circuit, filed December 27, 1993	1c

RELEVANT DOCKET ENTRIES

12/30/92	1	COMPLAINT filed; Summons issued and Notice pursuant to 28 U.S.C. 636(c); FILING FEE $120.00 RECEIPT #182917 (do) [Entry date 01/04/93]
1/21/93	13	ANSWER to Complaint by The National Railroa (Attorney Mark S. Landman), ; Firm of: SR by attorney Mark S. Landman for defendant The National Railroa (mk) [Entry date 01/22/93]
1/26/93	19	Findings of Fact by Defendant, The National Railroad Passenger Corporation (Amtrak). (jr)
1/28/93	21	PLAINTIFF MICHAEL LEBRON'S PRETRIAL PROPOSED FINDINGS OF FACT (jr)
1/28/93	22	PLAINTIFF MICHAEL LEBRON'S PRETRIAL PORPOSED CONCLUSIONS OF LAW. (jr)
2/5/93	23	STIPULATION AND ORDER, that because all claims, including TDI's counterclaim, have been tried and submitted to the Court, no reply to TDI's counterclaim is necessary (signed by Judge Pierre N. Leval). (jr)
2/5/93	25	OPINION AND ORDER (FINDINGS OF FACT AND CONCLUSIONS OF LAW) #71031, Plaintiff Lebron has convincingly demonstrated that in rejecting his contract to display his art on its billboard Amtrak was engaged in governmental action and that the standards employed by Amtrak in rejecting his work violated its obligations under the First Amendment. Defendants are accordingly directed to give plaintiff immediate access to the Spectacular in accordance with his contract (Signed by Judge Pierre N. Leval); Copies mailed. (jr) [Entry date 02/09/93]

2/8/93	24	ORDER, amending the Opinion and Order dated February 5, 1993, adding the following as a footnote at the end of the first full paragraph on page 27 (signed by Judge Pierre N. Leval); Copies mailed (jr) [Entry date 02/09/93]
2/9/93	26	ORDER, amending page 2 of the Opinion dated 2/5/93 to replace "Howard M. Spiro" with "Edward M. Spiro" and adding "David M. Kohane" after "Edward M. Spiro" on page 4, line 24 and replacing "$16,500" with "$18,500." (signed by Judge Pierre N. Leval); Copies mailed (jr) [Entry date 02/10/93]
2/10/93	32	ORDER, denying Amtrak's application to stay the district court's injunction pending appeal, and granting Amtrak's application for a brief stay to permit it to seek a stay in the Court of Appeals (signed by Judge Pierre N. Leval); Copies mailed (jr) [Entry date 02/11/93]
2/10/93	33	Filed Memo-Endorsement on letter from Edward M. Spiro to Judge Leval dated February 10, 1993, The motion to delete the first paragraph of the Judgment insofar as it names the defendant TDI is granted (signed by Judge Pierre N. Leval) (jr) [Entry date 02/11/93]
2/10/93	39	JUDGMENT # for Michael Lebron against The National Railroa, Transportation Displ, awarding Lebron costs (signed by Judge Pierre N. Leval); Mailed copies and notice of right to appeal. (E.O.D. 2/11/93). (jr) [Entry date 02/11/93]
2/10/93	40	NOTICE OF APPEAL by The National Railroa ; from [25-1] order Plaintiff Lebron has convincingly demonstrated that in rejecting his contract to display his art on its billboard

Amtrak was engaged in governmental action and that the standards employed by Amtrak in rejecting his work violated its obligations under the First Amendment. Defendants are accordingly directed to give plaintiff immediate access to the Spectacular in accordance with his contract, [39-1] judgment order. Copies of notice of appeal mailed to Attorney(s) of Record: R. Bruce Rich, Mark S. Landman, Edward M. Spiro . (em) [Entry date 02/11/93]

2/11/93	—	Notice of appeal and certified copy of docket to USCA: [40-1] appeal by The National Railroad ; Copy of notice of appeal sent to District Judge. (em)
2/16/93	41	RESPONSE by Michael Lebron Re: [19-1] Defendant's Findings of Fact #1- 28. (jr) [Entry date 02/17/93]
2/16/93	42	PRE-TRIAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW by Plaintiff Michael A. Lebron. (jr) [Entry date 02/17/93]
2/26/93	47	MANDATE OF USCA (certified copy) Re: Appeal by Amtrak, No. 93-7127. Appellant's notice of motion for expedited consideration is granted. A scheduling order will issue. (Elaine B. Goldsmith, Clerk). E.O.D. 3/3/93. (jr) [Entry date 03/03/93]
3/2/93	46	Notice that the original record on appeal has been certified and transmitted to the U.S. Court of Appeals: [40-1] appeal by The National Railroa (jr) [Entry date 03/03/93]
3/4/93	48	STIPULATION AND ORDER, that the following exhibits and deposition transcripts, which were not listed on the district court docket sheet but

were introduced as evidence at trial before the district court on 1/27/93, were to be made part of the district court record and deemed included as part of the record on the appeal to the Court of Appeals (signed by Judge Pierre N. Leval). Night Deposit on 3/4/93 at 4:47 p.m. (jr) [Entry date 03/11/93] [Edit date 03/11/93]

3/16/93 49 Notice that the first supplemental record on appeal has been certified and transmitted to the U.S. Court of Appeals: [40-1] appeal by The National Railroa (jr)

2/1/94 51 MANDATE OF USCA (certified copy, docketed as Judgment #94,0235) Remanding [40-1] appeal by The National Railroa to the US District court, SDNY. (George Lange, III, Clerk) E.O.D. 2/3/94. (jr) [Entry date 02/03/94] [Edit date 02/03/94]

2/11/93 Appellant NRPC motion for stay pending appeal, to expedite appeal, to file oversized memorandum of law FILED (w/pfs). [362079-3] Orig & 3cc's to CAL. 1cc in Acco (com)

2/18/93 Appellee Michael A. Lebron memorandum of law in opposition to motion for stay [362079-1] filed (w/pfs). (cal)

2/23/93 Order FILED GRANTING motion for stay [362079-1] by Appellant NRPC, endorsed on motion form dated 2/11/93., GRANTING motion to expedite appeal [362079-2] by Appellant NRPC, endorsed on motion form dated 2/11/93., GRANTING motion to file oversize memo [362079-3] by Appellant NRPC, endorsed on motion form dated 2/11/93. Further stating a scheduling order will issue filed. (JEL, JMMcL, CJJ, Duffy, DJ) (coj)

2/23/93 Certified copy of the order, dated February 23, 1993 issued to the district court. (coj)

2/25/93 Expedited scheduling order filed. Record on appeal is due on 3/4/93. Appellant's brief and appendix due on 3/18/93. Appellee's brief is due on 4/8/93. Appellant's reply brief is due on 4/15/93. Argument as early as the week of 4/26/93. (com)

3/17/93 Proposed for argument the week of 4/26/93. (car)

3/18/93 Appellant NRPC brief FILED with proof of service. (twd)

3/18/93 Appellant NRPC joint appendix filed w/pfs. Number of volumes: 2. (Vol.I = A1-A726, Vol.II = a727-End) (twd)

3/18/93 Appellant NRPC exhibits filed with proof of service. Number of volumes: 4. (twd)

3/25/93 Set for argument on 4/27/93 . [93-7127] (cao)

4/8/93 Appellee Michael A. Lebron motion to strike pages from joint appendix, to allow to file supplemental exhibits FILED (w/pfs). [380536-2] (org +3 to cal). (twn)

4/8/93 Appellee Michael A. Lebron papers supporting motion # [380536-1] by Appellee Michael A. Lebron, supporting motion # [380536-2] by Appellee Michael A. Lebron filed. (org +3 to cal). (twn)

4/8/93 Appellee Michael A. Lebron exhibits received. Number of volumes: one (org +4). Problem: motion pending for permission to file. (3 to cal). (twn)

4/8/93 Appellee Michael A. Lebron brief filed with proof of service. (twn)

4/15/93	Appellant NRPC reply brief filed with proof of service. Satisfy appellant's reply brief due. (twd)
4/15/93	Appellant NRPC affidavit, and memorandum of law in opposition to motion to allow [380536-2] (to CAL) filed (w/pfs). (twd)
4/16/93	Appellee Michael A. Lebron papers supporting motion # [380536-1] by Appellee Michael A. Lebron filed. (org +3 to cal). (twn)
4/27/93	Case heard before Newman, Mahoney, Lumbard, C.JJ. (TAPE: 192) (caw)
4/28/93	Appellee Michael A. Lebron 28(J) letter received. (twk)
4/29/93	Appellant NRPC 28(J) letter received. (twk)
5/21/93	Appellee Michael A. Lebron 28(J) letter received. (copies to panel) (twd)
6/8/93	Appellee Michael A. Lebron 28(J) letter received. (copies to Panel) (twk)
12/27/93	Judgmentof the district court is REVERSED & the case is REMANDED with the instruction to dismiss the complaint. At stated at oral argument, Lebron's motion to strike pages from the joint appendix and for double costs and attorney fees is denied; his motion to file a supplemental volume of exhibits is granted by published signed opinion filed. (JDM). (twd)
12/27/93	Judge Newman DISSENTING in a separate opinion filed. (twd)
12/27/93	Judgment filed. (twd)
12/27/93	Appellee Michael A. Lebron supplemental appendix filed with proof of service. (see opinion dated 12/27/93) (twd)

1/24/94	Judgment MANDATE ISSUED. (twn)
4/4/94	Notice of filing petition for writ of certiorari for Appellee Michael A. Lebron dated 3/28/94 filed. Supreme Ct#: 93-1525. (twd)
5/11/94	Record on appeal RETURNED to lower court. No. of volumes: 2 (ref)
5/31/94	Certified copy of Supreme Court order GRANTING petition for writ of certiorari [505140-1] by Appellee Michael A. Lebron, dated 5/23/94. (twd)

AFFIDAVIT OF MICHAEL LEBRON

MICHAEL A. LEBRON, being duly sworn, deposes and says:

1. I am the plaintiff in this action; I am a citizen and resident of New York City, New York. I submit this affidavit in support of the motion for a temporary restraining order and/or a preliminary injunction.

2. I am an artist. I concentrate on creating visual works of a social or political nature to be displayed in public places such as subways and transportation centers. An important goal of my artistic expression is to responsibly engage the public in important political or social issues, which I seek to achieve by placing my works in mass transit stations where I can reach a wide audience.

3. For example, shortly after the congressional Iran-Contra hearings in 1987, I installed in advertising space in the Washington, D.C. subway stations a series of 25 works comprised of drawings by different Nicaraguan children. These included photographs and texts describing the impact of the war in Nicaragua on the most helpless members of that society, its children.

4. In 1984, a political poster that I installed in the Washington, D.C. subway was the subject of a lawsuit, *Lebron* v. *Washington Area Metro. Area Transit Auth.*, 749 F.2d 893 (D.C. Cir. 1984), when a public transit authority tried to suppress it on the ground that it was "deceptive." The poster, which bore the caption "Tired of the Jellybean Republic?", was intended to convey my views about the way in which certain segments of the American population had reacted to the Reagan Administration. The court of appeals held that the refusal by the Washington Metropolitan Transit Authority to display the poster because of its content violated the First Amendment.

5. While my work achieves its full effect when exhibited in public places, some of my work has also been exhibited in galleries. Because of the social, political, and public nature of the work, however, it has been exhibited primarily in "alternative" or university galleries that are more likely to exhibit this kind of work. I have also exhibited my work in other countries. I currently have a piece in an exhibition inaugurated by the highly-regarded Camerawork gallery in London which is now traveling to other galleries in the British Isles.

6. Critics have agreed that my work is best suited to public spaces. As one critic noted, because my work "proposes an alternative rhetoric . . . (and) argues for more open public situations, it looks bright but stranded (in a gallery environment)—in cold storage as it were, pending delivery to (its) rightful context." Bill Berkson, art critic, *ARTFORUM* 1986 (attached as Exhibit A). In fact, the majority of curators in mainstream art institutions have declined to show my work, finding that it is too "utilitarian," or, even more bluntly, that "it looks like advertising." Therefore, the strategic logic of my work argues for independent production and promotion in the public places once associated with the town square, now more closely associated with the subway stations, bus shelters, airports, train terminals, shopping malls, etc. of our large, urban areas.

7. I became motivated to do the project that is the subject of this suit while watching the Iran-Contra hearings in the summer of 1987. I had just spent several weeks that spring in the Nicaraguan war zone doing research on another project. I followed with interest the testimonies of that summer, feeling outraged at what appeared to be a flagrant disregard for the law, and the apparent unwillingness of the investigating committee to aggressively pursue the matter. I noted with interest the testimonies of three private citizens, including Joe Coors, of whom I knew little at the time. I researched his background and decided to do a piece about it someday, feeling that there was an interesting story here that was being neglected by the press. I ride Amtrak often, and each time I walked past the Penn Station Spectacular, I visualized the form this work

would take. I knew I would be unable to raise money for this project, and undertook to save the $100,000 it would take to realize the creation and installation of this work in Penn Station. I interviewed professional photographers and hired one. In September 1991, we flew to Nicaragua to hire a theatre company and to scout for a location. In October 1991, we returned to Nicaragua to shoot the imagery needed for half the piece; the remaining photography was completed in Los Angeles and Baltimore. Electronic assembly was completed in New York. In all, over 100 people worked on the project.

8. The Penn Station Spectacular is a large, curved advertising display space located in Pennsylvania Station at the entry to the station measuring approximately 103 feet long by 10 feet high. The very size of the Spectacular allowed me to design and visualize this work with an effectiveness and clarity that would have been otherwise impossible to achieve. Its size and shape make it one of the largest advertising display spaces in New York City, and its prominent location in Pennsylvania Station means that it is visible to a large segment of the traveling public, providing an excellent opportunity to reach exactly the kind of audience I hope to engage with the subject matter of this piece. For all these reasons, I consider the space an extraordinarily unique advertising location in New York City, and a unique challenge to my communicative skills as an artist that no gallery and few other public environments could provide.

9. I have created a work that is designed to be displayed in the Penn Station Spectacular and in no other place. The specific object of the work is to draw attention to the connection between the profits of the Coors Brewing Company, of which all of the voting shares of stock are held by a Coors family trust, and the right-wing causes that the Coors family supports, either directly or through the Coors Foundation. The work attempts to expose the contradiction between the imagery of Coors corporate marketing and the social and political agenda that Coors family members seek to realize. In a general sense, the work is an allegory about the destructive influence of a powerful, urban, materialistic and individual-

istic culture on rural, community based, family-oriented and religious cultures.

10. The caption "IS IT THE RIGHT'S BEER NOW?" is a parodic play on the Coors beer advertising slogan. The caption appears over a photomontage that depicts on the left a group of young Americans partying, each holding a can of Coors beer and facing the right side of the photomontage, which displays Nicaraguans looking apprehensively in the direction of the American beer drinkers. Bridging the two "scenes" of the photomontage is a can of Coors beer with a comet tail shooting out behind, a parody of the Coors "silver bullet." The accompanying text connects the profits made by the Coors Brewing Company and its owners with the right-wing causes supported by Coors family members and the Coors Foundation. In particular, it mentions that Joseph Coors financed the purchase of an aircraft for the Nicaraguan contras.

11. In August of 1991, and again in May of 1992, I contacted TDI about leasing the Penn Station Spectacular. By July 31, 1992, Bill Schwartz, a TDI account executive and I had agreed upon the period of time that TDI would lease the space (January and February 1993) and the financial terms ($18,500 gross rent and maintenance). Because I was not leasing the space for a long period of time, the cost included a surcharge. On August 19, 1992, I signed and returned to Mr. Schwartz a standard form TDI contract that reflected these terms. Mr. Schwartz told me at the time that the contract was subject to the possibility that the existing lessee, the A&S department store, might renew its lease. He asked me what the work was about. I said that I didn't want to say at the time, except that it was political, and that it would look like a conventional ad. I asked him if there would be a problem with that. He stated that unless the work was sexually obscene or graphically violent, he saw no reason for the work to be rejected by the approval process.

12. Shortly before Thanksgiving, I met with Mr. Schwartz. He notified me that the Penn Station Spectacular would probably be available to me in accordance with the agreement we

had earlier discussed. Even if A&S wanted to renew its lease, TDI said that A&S was willing to be flexible and give me a 2-month contract before their renewal began. It is my understanding that, but for these two months, the Spectacular is leased to A&S on a long-term basis. At this meeting, I showed him copies of other works of mine. He stated that he had seen my work elsewhere and was familiar with it, and expressed excitement that what I was installing in the Spectacular was not merely reproductions of past works, but a new work designed specifically for the Spectacular. Shortly afterwards, he notified me that we had an agreement, and on November 30, 1992, TDI sent me a copy of the final contract with its signature (attached as Exhibit B).

13. In reliance on Mr. Schwartz's representations, I took steps in November to have a miniature version of the work and the accompanying text prepared for submission to TDI. Because the TDI contract states that "all advertising copy is subject to approval of TDI and [Amtrak] as to character, text, illustration, design and operation," I provided TDI a color photocopy of the work and the text for review on December 2, 1992.

14. In preparing this work, I considered it my responsibility to include only information that could be substantiated as true and factual in the public record. To substantiate my statements, I consulted reports and other printed materials, such as the annual report of the Coors Foundation, a report on The Coors Connection prepared by Russ Bellant for Political Research Associates, Joseph Coors's own testimony before a Senate investigating committee, and I.R.S. filings. I view this work as simply a "re-presentation" of information already on the public record, albeit with an artistic interpretation, a "re-presentation" that is designed to capture the public's imagination. The methods I use are similar to those employed by any professional commercial advertising agency, except that I hold myself to higher standards of accountability.

15. I do not seek to sell anything other than ideas with this advertisement. However, this project is an important part of

my work as a political artist. If defendants breach their contract with me and do not permit me to display the advertisement as contemplated in the contract, I will suffer significant injuries to my reputation as an artist, to my goal of disseminating the ideas in this work, and to my emotional well-being, which is highly invested in this work.

16. I consider this work a timely political statement, particularly in light of renewed interest in the Nicaraguan issue as a result of President Bush's pardon of several Iran-Contra figures. Any delay in displaying the work will cause irreparable injury to my ability to express my message in the way I contracted to do.

17. My contract with TDI requires me to provide durable transparencies (known as "duratrans") to TDI before the beginning of the contract period, which is January 1, 1993. There is only one photolab in New York City that is equipped to make a duratrans of this size, and it is the same lab that makes the duratrans for nearly all advertising displays that are intended for the Penn Station Spectacular. The photolab requires six days without overtime to make the duratrans. It could produce the duratrans in three days with 100% overtime, charged at double the regular rate plus additional overhead fees, but then I would have to bear the additional stress and expense. Since my contract period follows the Christmas holidays, I needed to have clearance from TDI by December 22, 1992, if the duratrans were to be produced without incurring any overtime expense.

18. In a December 7, 1992 letter, Tina Haut, TDI's general counsel, notified me that she was sending my materials to Amtrak for approval. I believe that my attorneys contacted Mr. Schwartz and/or Ms. Haut on December 4 and 7. I learned that Ms. Haut objected to my description of how the work was paid for, and I changed the copy to accommodate her objection.

19. Despite my need to have prompt notice of TDI's and Amtrak's comments before December 22 so as to meet my contract obligations without incurring any extra expense, and

despite my repeated efforts at contacting them to elicit a response, TDI failed to inform me of Amtrak's comments until 2:45 p.m. on December 29, 1992, when I learned for the first time that Amtrak had rejected my advertisement on the ground that it does not accept political advertising for the Spectacular.

20. I visited Penn Station on December 28, 1992, to see the types of advertisements defendants had accepted for the Spectacular and adjacent areas. In the area immediately in front of the Spectacular, I was interested to see prominent kiosk advertisements for *The Plain Truth* magazine, which is published by the controversial fundamentalist Worldwide Church of God. The display included bins containing free copies of the magazine, a copy of which is attached as Exhibit B hereto. The Worldwide Church of God is a small but well-known cultist organization founded by the late Herbert W. Armstrong, who I understand published a book about racial theology containing implicitly anti-semitic ideas.

The presence of these advertising displays demonstrates that Amtrak and TDI do accept ideological, non-commercial advertising.

/s/ MICHAEL A. LEBRON
Michael A. Lebron

Sworn to before me this
29th day of December, 1992

/s/ GLORIA C. PHARES
Notary Public

Gloria C. Phares
NOTARY PUBLIC State of New York
No. 31-4947843
Qualified in New York County
Commission Expires February 27, 1993

92 Civ. 9411 (CES)

DECLARATION OF ANTHONY D. DE ANGELO

Anthony D. DeAngelo deposes and says:

1. I am Vice President–Real Estate and Operations Development of the National Railroad Passenger Corporation ("Amtrak"). I have headed Amtrak's Real Estate Department since 1982, when I was appointed Amtrak's Assistant Vice President–Real Estate. I have held my present position since 1989.

2. Amtrak's Real Estate Department is responsible for the management and development of the railroad stations and other real property owned by Amtrak, including Penn Station in New York City. Since I became head of the Department in 1982, my responsibilities have included formulating and overseeing Amtrak's policies regarding the use of Amtrak-owned property for non-transportation purposes such as advertising.

3. Amtrak contracts with Transportation Displays Incorporated ("TDI") for the sale of advertising space in Penn Station. Among the spaces in Penn Station for which TDI sells advertising under its contract with Amtrak is the "Penn Station Spectacular" ("the Spectacular"). The Spectacular consists of a series of illuminated panels, approximately 103 feet long and 10 feet high, that are suspended from the ceiling of the main waiting room and are used for a single advertisement.

4. Amtrak's policy, which has been consistently observed during the ten years that I have headed the Real Estate Department, is that it will not permit the display of political advertisements, regardless of their content or viewpoint, on the Spectacular. This overwhelming structure is the first thing that many Amtrak passengers see when they enter Penn Station, and Amtrak does not want to require its passengers to view advertisements on the Spectacular that they may deem offensive or devisive. Amtrak is careful to ensure that that the

Spectacular is not used for, among other things, advertisements that are political, pornographic, or that are inimical to Amtrak's business interests (such as advertisements that promote the services of Amtrak's competitors).

5. Section 6 of Amtrak's contract with TDI, a copy of which is appended to my declaration as Exhibit A, provides that all advertising solicited by TDI is subject to Amtrak's approval. Pursuant to this provision, Amtrak requires TDI to submit for Amtrak's review and approval all advertisements proposed for the Spectacular in advance of their display.

6. On December 8, 1992, Amtrak's Real Estate Department received a letter from TDI, a copy of which is attached to my declaration as Exhibit B, to which was appended a proposed advertisement that a Mr. Lebron wished to display on the Spectacular. On December 23, 1992, the Real Estate Department sent a letter to TDI, a copy of which is appended to my declaration as Exhibit C, in which it advised TDI that Amtrak could not accept the proposed advertisement because of Amtrak's policy of not allowing political advertising on the Spectacular. This letter was signed on my behalf by John J. Turpin of the Real Estate Department, to whom I had delegated signature authority during my absence from the office.

I declare under penalty of perjury that the foregoing is true and correct. Dated December 31, 1992.

/s/ ANTHONY D. DEANGELO
Anthony D. DeAngelo

EXCERPTS FROM DEPOSITION TESTIMONY OF ANTHONY DEANGELO

Deposition of Anthony DeAngelo, taken on behalf of Plaintiff, held at the offices of Amtrak, 60 Massachusetts Avenue, N.E., Washington, D.C., commencing at 11:46 a.m., Thursday, January 7, 1993, before Mario A. Rodriguez, Notary Public, and continued on Saturday, January 23, 1993.

* * *

[8:2 - 13:25] A. I have.

Q. And so I can assume from that you are the vice president for real estate and operations development of the National Railroad Passenger Corporation?

A. That's correct.

Q. From hereon I am referring to that corporation as Amtrak.

A. Fine.

Q. And you've held that position or rather you have headed the real estate department since 1982?

A. Correct.

Q. And you were appointed Amtrak's assistant vice president for real estate in 1989?

A. No. No. Assistant vice president for real estate in 1982. In 1989, vice president of real estate and operations development.

Q. And what was added in 1989 was operations development?

A. Correct.

Q. What does that mean?

A. That means responsibility for profit making endeavors of the corporation outside of running the railroad.

Q. Can you give me an example of that?

A. Sure. Contract for running commuter trains for local commuter authorities. We run someone else's trains and we do that in order to make a profit.

Q. And when you mean commuter trains, you are distinguishing them from the railroad meaning the system operated by Amtrak?

A. I am.

Q. Okay. And can you tell me what is your responsibility under the part of your responsibilities that include real estate?

A. I have the top staff management position, in response for all policies and procedures dealing with Amtrak's real estate needs.

Q. And that includes Penn Station in New York?

A. Yes.

Q. Does it include Union Station in Washington?

A. It does to the extent it is our responsibility. There are certain portions that is not ours, but to the extent it is, I am responsible for it.

Q. What portions of Union Station are not under the contract?

MR. SLATTERY: Objection on relevance.

A. Retail space.

Q. And it is not Amtrak's responsibility because it has been let by Amtrak?

A. No. Amtrak does not own Union Station. It is owned by the federal government which leases it to Union Station Redevelopment Corporation which in turn leases it to LaSalle Partners which in turn subleases to a variety of people.

Q. I see. Does Amtrak own Pennsylvania Station?

A. Yes.

Q. When did it acquire Pennsylvania Station?

A. Prior to my tenure as vice president or assistant vice president, but it was acquired in 1976.

Q. 1976?

A. '76 or '77. I'm not exactly sure.

Q. And when you refer to Pennsylvania Station, what do you refer to? What are we describing?

A. The station.

Q. We're describing I take it in at least laymen's terms that portion of the property which is below the street level?

A. Yes. We own nothing above street level. That's correct.

Q. All right. Is there any part of the area below street level for which Amtrak is not responsible?

MR. SLATTERY: I think that is a little bit ambiguous. Answer the question.

A. We entered into a long-term lease, I think in 1986, with the Long Island Railroad where we leased them a major portion of what we call the A level of Penn Station. Although the lease is 100 something pages long, it in effect gave them control of that space so they control all activities that take place in that area.

Q. Are there any other portions of the station that you—

A. There is a whole series of leases, subleases and other arrangements. For example, we are required to provide space to New Jersey Transit under terms of other legal documents I'm not familiar with. We do provide such space and remuneration is not set by us, but by the federal government.

Q. When you say you are not familiar with the legal documents, do you have any idea what legal documents specify—

MR. SLATTERY: Objection. It calls for speculation.

BY MS. PHARES:

Q. I'm asking if you know what they are?

A. I don't know.

Q. Do you know who at Amtrak knows what they are?

A. Someone in our legal department, I assume.

Q. Is the area of Pennsylvania Station in which the New York subway system operates under the responsibility of Amtrak?

A. There is a variety of easements and cross easements and other legal arrangements that have been arranged over the years, but I'm not familiar with them. There remains questions exactly who has control over what when you get to some of the details, so there are a variety of arrangements.

Q. When you refer to "easements," are you referring to the track arrangements or station arrangements?

A. I'm referring to station.

Q. The station arrangements?

A. And access to subway, for example, in response to your previous question where they butt up against each other.

Q. You referred in your prior answer to remuneration that is set by the federal government. Do you know how the federal government sets that remuneration?

MR. SLATTERY: Objection. I don't recall that statement.

MS. PHARES: But the witness may answer.

MR. SLATTERY: Subject to my objection.

* * *

[15:2 - 18:25]provide it to us.

MR. SLATTERY: Your request for that is noted.

* * * INFORMATION REQUESTED TO-BE SUPPLIED:

MS. PHARES: All right. I'm going to ask the reporter if he would mark your drawing as Plaintiff's Exhibit 1, please.

(WITNESS' DRAWING MARKED PLAINTIFF'S EXHIBIT-NUMBER 1 FOR-IDENT.)

BY MS. PHARES:

Q. If you don't mind my asking you questions over your shoulder?

A. Sure.

Q. Would you just define your abbreviations on the exhibit.

A. MSG, Madison Square Garden, PPII is Penn Plaza II, an office building; B level, A level, track level.

Q. Now, can you describe what is on the B level?

A. Uh-huh. Primarily, Amtrak facilities including waiting area, ticket counters, restrooms, passenger baggage handling, et cetera, plus a number of retail stores.

Q. And is that also where the Penn Station Spectacular is located?

A. Yes.

Q. What is on the A level?

A. Primarily, commuter space used by Long Island Railroad and also by New Jersey Transit. A certain amount of retail as well.

Q. And I take it on what is designated as track level is just what it says?

A. Tracks, that's right.

Q. Is there some portion of your drawing in which the—where the subway appears?

A. No, not in my drawing.

Q. Is that because it is not part of Pennsylvania Station?

A. (Witness nodding.)

Q. So then your arrangements with regard to the subway refer to the easements you were describing earlier?

MR. SLATTERY: Objection to the extent it calls for a legal conclusion.

You can answer the question.

A. Well, there are subways at 7th and 8th Avenue which I have so indicated where the streets are located and people can walk, passengers from our station to the subway and vice versa. So there are clearly many areas of passageway between the two, but I have not shown it because they are not part of Pennsylvania Station.

Q. The passage ways are not part of Penn Station?

A. Up to a point. Beyond that, it is part of the city subway system.

Q. I see. Now, I sort of veered away where I had been before. I will probably return to your schematic.

A. Sure.

Q. To whom do you report?

A. Mr. William Norman, executive vice president.

Q. Who reports to you?

A. By name?

Q. No, generally.

A. All of the entire real estate and operations development department through a chain of command.

Q. Are they all located in Washington?

A. All save one who is in Chicago.

Q. And for how long have you been with Amtrak?

A. Since March 1 of 1982.
Q. And before that?
A. Immediately before?
Q. Have you been in the railroad business for a good deal of time?
A. No, this is my first exposure to the railroad business.
Q. What was your most immediate prior employment?
A. Deputy assistant secretary of commerce for economic development.
Q. And in that capacity, did you have any supervision of matters relating to railroads?
A. Supervision of what?
Q. Matters relating to railroads?
A. We had relationships on railroad matters, yes, and I would be involved in those.
Q. What were your responsibilities in that position?
A. Well, I was in charge of the program

* * *

[20:2 - 33:25] the activities that were in connection with the establishment of Conrail?
A. No.
Q. Were any of them in connection with the Northeast Corridor?
A. To the extent the projects were located that I referred to previously in the Northeast Corridor, the answer is yes.
Q. Were any of the projects in the Northeast Corridor?
A. I'm sure they were. I don't recall.
Q. Now, you have been held out as familiar with the operations of Amtrak's board and I have several questions in connection with that.

MR. SLATTERY: Let me note for the record that we object to that characterization, but you can proceed.

BY MS. PHARES:

Q. Do you know how often the board meets?
A. I do.
Q. How often does it meet?
A. Generally speaking, once a month.

They do not meet the month of August, and the meetings in November and December are combined into one.
Q. How many board members are there?
A. Nine.
Q. How many of those nine if you know are appointed by the president?

MR. SLATTERY: Objection. I think we are getting a little far astray here from the issues in this case and to the extent you want to ask Mr. DeAngelo any questions about Amtrak's board, I would like to object on relevance grounds to that line of questioning, but permit you to proceed.

MS. PHARES: That's agreeable.

THE WITNESS: I'm not sure I know the answer to that question. I could speculate, but I'm not certain.

BY MS. PHARES:

Q. I don't want you to speculate. Does the board operate through any committees?
A. Yes.
Q. More than one?
A. Yes.
Q. Do you know how many?
A. Not precisely.
Q. Can you describe the committees or name the committee for me?
A. I can name several of them, the ones I have had occasion to deal with. The finance committee, consumer affairs committee, operations committee. There are others, but those are the three I've dealt with.
Q. Do you attend board meetings?
A. No.
Q. Do you report to any of the board committees?
A. Yes.
Q. Which ones?
A. Finance, operations and consumer affairs.
Q. I assume or you could correct me if I'm wrong that the board keeps minutes?
A. They do.

Q. Do the committees keep minutes?

A. They do.

Q. How often do the committees meet?

A. As often as the board meets.

Q. Of the three committees with which you are familiar, does any one of them have supervision of real estate?

A. You have to define what you mean by "supervision."

Q. That's not a good word. Actually, I was going to use something more general, more helpful. Is each of them concerned with Amtrak's real estate?

MR. SLATTERY: That's a little bit ambiguous, but you can answer the question.

A. To the extent when I appear in front of these three committees, I am presenting particular projects to them. I would be presenting it to them because they would be concerned with that type of project, so to that extent they are concerned.

Q. What does each of those committees do?

A. The finance committee is concerned with the financial matters of the corporation.

Q. Uh-huh.

A. The operations committee is concerned with the operational aspects of the corporation's functions and the consumer affairs is concerned with the consumer affairs part of the corporation.

Q. At least as a first glance it seemed to me there might be overlap between operational aspects and consumer affairs. Could you describe more particularly for me how they are different?

A. I can do that by illustration. Operational aspect, we would be concerned about on-time performance of the trains. Consumer affairs, we would be concerned about the quality of food on the trains. To give you two illustrations.

Q. So is it more likely that matters relating to the advertising policies or the free speech policies for Amtrak would come under the operations committee; is that correct?

MR. SLATTERY: I think that calls for speculation, but you can answer the question.

A. Well, I'll answer part of the question. The part that speaks to advertising, but not the rest of the question. On advertising, if any committee was to deal with it, it would be the finance committee.

Q. It would be the finance committee?

A. Uh-huh.

Q. Why is that?

A. Because we enter into advertising arrangements in order to make money for the corporation, therefore it is a financial issue.

Q. Do I understand from your prior answer you don't know under what committee Amtrak's free speech policy is dealt.

A. I'm not sure.

MS. WINKLER: That's assuming it is dealt with any committee. That is an assumption of a fact not in evidence.

MS. PHARES: Fair enough.

BY MS. PHARES:

Q. Are there particular actions of Amtrak that require board approval?

A. Yes, there are.

Q. What are they?

A. Well, there is a delegation of authority and I can speak to the real estate aspect to that.

Q. Would you please.

A. Any sale of our property must go in front of the board. Any lease or other arrangement with anyone above a certain dollar amount must go to the board. I can't tell you offhand that dollar amount.

Q. Anything else?

A. No.

Q. Are there any contracts that have to be approved by the board relating to the real estate?

A. The contracts are approved by me. What I do is go to the board with a—let's say it is a lease of a piece of property along a right of way. I will tend them that we intend to lease the property under certain conditions and they will approve that, but they will never see the contract or any of the details of the contract.

MR. SLATTERY: Can we go off the record for a second.
(Discussion off the record.)

BY MS. PHARES:

Q. What stations does Amtrak own along the Northeast Corridor?

MR. SLATTERY: I am going to object to inquiries of other stations on the grounds of relevance, but you can proceed.

A. I'll try to run south to north.

Q. Okay.

A. I believe I will be correct, but I reserve the right to make a mistake. BWI, Baltimore, Wilmington, Philadelphia; Penn Station, New York; Providence, Rhode Island.

Q. And does Amtrak arrange for the leasing of advertising space in those stations?

A. Yes.

Q. And am I correct that it does so through entities such as Transportation Displays Incorporated?

A. Yes.

Q. Does it—

A. Excuse me. There are a number of other stations that we own in the Northeast Corridor that are small tiny stations, many of them are leased to CEPTA, the Philadelphia commuter agency.

Q. Okay. Thank you. Does Amtrak itself directly let advertising space in any of its own stations?

A. No.

Q. And am I correct that in Pennsylvania Station, it lets advertising through TDI?

MR. KOHANE: Objection to form.

MR. SLATTERY: Objection to the extent it calls for a legal conclusion as to the relationship.

MR. KOHANE: And it assumes facts not in evidence.

THE WITNESS: I believe the answer is yes.

BY MS. PHARES:

Q. Does it lease advertising space in Penn Station through any other entity?

MR. SLATTERY: Same objection.

A. No. I believe the answer is no.

Q. Now, when was the what is referred to as the Penn Station Spectacular installed in Pennsylvania Station if you know?

A. Before my time.

Q. Before 1982?

A. (Witness nodding.) Yes.

Q. Who would know when it was installed?

A. It was prior to—I don't know.

Q. Do you know if it was prior to Amtrak's acquisition of Penn Station?

MR. SLATTERY: Objection. Lack of foundation.
You can answer the question.

A. I honestly—I think it was, but I do not know that.

Q. Fair enough. Does Amtrak lease the advertising space in the portion of Penn Station that Amtrak leases to the Long Island Railroad?

MR. SLATTERY: Objection. It calls for a legal conclusion.
You can answer that question.

A. No.

Q. Does Amtrak have any general standards regarding advertising?

MR. SLATTERY: Objection. Ambiguous.
You can answer it.

A. General standards. Could you explain what you mean by that?

Q. Does it have any general standards regarding what advertising it will accept?

MR. SLATTERY: Objection. Ambiguous.

A. I guess the answer is yes. If I understand where you are coming from, I think the answer is yes.

Q. What are those standards?

MR. SLATTERY: Objection. Ambiguous.
You can answer the question.

A. Our standards would call for things that are noncompetitive with our business interest, that are not pornographic,

and not objectionable to our riding public and others associated with us including political and other types of potentially controversial matters.

Q. When you said that your standards would call for, are those the standards?

A. Uh-huh, yes.

Q. Are they written?

A. No. Well, let me—not in the form I just read them to you, not as I just stated them to you.

Q. Are they written anywhere in any form?

MR. SLATTERY: Are we talking about any standards at any Amtrak station?

BY MS. PHARES:

Q. At any Amtrak station, to begin with.

A. For any advertisement?

Q. Right.

MR. SLATTERY: I'm going to object on relevance grounds, but you can answer the question.

A. The only standards that I'm aware of in writing would be those contained in the arrangements we have with TDI and there has been several of those over the years and it would be the language stated in there which we have and I do not believe they will be stated anyplace other than there. TDI and its predecessor.

Q. Is its predecessor named Winston-Salem?

A. Winston Network, I believe.

Q. Do these standards apply in all the owned stations that you described earlier?

MR. SLATTERY: Are you asking whether the TDI contract applies to all the owned stations?

BY MS. PHARES:

Q. No. I'm asking whether or not the standards that you just described, whether or not an advertisement was competitive with Amtrak or whether it was nonpornographic or objectionable to your riding public, do those standards apply in all of your stations.

MR. SLATTERY: Objection on the grounds of ambiguity.

A. Yes.

Q. Do they apply to billboards that are along the Amtrak right of way?

MR. SLATTERY: Objection. No foundation.

BY MS. PHARES:

Q. Are there billboards long the Amtrak right of way?

A. There are.

Q. Do the standards apply to those billboards?

MR. SLATTERY: Objection. Foundation.

A. Yes.

Q. Do those standards apply to the Pennsylvania Station Spectacular?

A. Yes.

MR. SLATTERY: Objection. Foundation.

BY MS. PHARES:

Q. Just talking about Penn Station alone, do I understand correctly, or correct me if I'm wrong, that there is a blanket policy against political advertising in all of Penn Station?

MR. SLATTERY: Objection. Ambiguous.

You can answer the question.

A. There is a policy, yeah.

Q. Now, how do you define political?

A. Mostly noncommercial.

Q. Well, let me give you an example. If you're provided with a—you may have seen a current Benneton ad, they sell clothing.

A. Right.

Q. That includes an oil laden duck, a

* * *

[35:2 - 35:25] A. I'm not sure I would agree with that. I don't know.

Q. Well, if an advertisement regardless of what is in it, but if an advertisement purports to sell a product or services, then that's what you would describe as commercial?

A. Uh-huh.

Q. And everything else is political?

MR. SLATTERY: Objection. There is no foundation.
MS. PHARES: I'm just asking.

BY MS. PHARES:

Q. And then would you describe any other advertisement as political?

A. Potentially. I mean I can't answer it yes or no.

Q. When were the advertisement standards that you described earlier established?

A. In general?

Q. In general.

A. Well, prior to my arrival. And I couldn't be more specific than that.

Q. And you don't know who was responsible for them before your arrival?

* * *

[37:2 - 40:8] BY MS. PHARES:

Q. Now, what I don't remember, was there an answer to the question?

MR. SLATTERY: Maybe the court reporter can read that back.

MS. PHARES: I'll say it again.

BY MS. PHARES:

Q. Who told you about the standards?

A. I couldn't be specific about that.

MR. SLATTERY: We're talking about the standards to which Mr. DeAngelo testified earlier, is that my understanding?

MS. PHARES: That's correct.

MR. SLATTERY: Okay. That's fine.

BY MS. PHARES:

Q. Who decides whether or not an advertisement meets those standards?

A. I do after it goes through the staff process, but then I'll be the final authority for the corporation.

Q. And does anybody review those decisions after you've looked at them?

A. Not as a rule.

Q. Does anyone ever look at them after you do?

A. They never have, but, you know, I have a boss. He can review anything I do.

Q. To your knowledge, have the advertising standards ever been reviewed by anybody superior to you?

A. To my knowledge, they have never been other than me.

Q. By what authority do you exercise these advertising standards?

MR. SLATTERY: Anywhere on the Amtrak system now? We object on relevance grounds except to those relating to Penn Station.

A. My authority is the responsibility I have been given by the corporation to be in charge of all real estate activities for the corporation including among a lot of other things the advertising that we have in our stations along the right of way.

Q. Can you tell me particularly what the procedure is for the review of an advertisement within your department?

MR. SLATTERY: Are we talking about any advertisement now? You're assuming it's one procedure.

BY MS. PHARES:

Q. Is there one procedure?

A. No.

Q. How many different procedures are there?

A. I'm not sure. A number.

Q. What decides how an advertisement is reviewed?

A. Well, specifically, there is a different procedure for the Spectacular in Penn Station than there is for other types of advertisement.

Q. Is that procedure set out someplace?

A. It is.

Q. Where is it set out?

A. In the license—I believe it is a license agreement with TDI.

Q. Does TDI have a separate license agreement with the Penn Station Spectacular than it does for the rest of Penn Station?

MR. SLATTERY: Objection to the extent it calls for a legal conclusion.

A. I'm not certain. It has been treated differently over the years. I cannot speak as to the precise current legal arrangement. It has over time been spelled out in different terms.

Q. Has it been set out anywhere else?

A. Not to the best of my knowledge.

* * *

[41:2 - 44:8] of attorney-client privilege. I am going to instruct the witness not to answer.

BY MS. PHARES:

Q. Did you review any documents in connection with your preparation for your deposition?

MR. SLATTERY: You can answer the question.

A. Yes.

Q. All right. Let's take two examples. The review of an advertisement for the Penn Station Spectacular and then just for the Penn Station advertisement other than the Spectacular, and would you describe for me the chain of review.

A. Okay. Starting with the Spectacular?

Q. Yes.

A. TDI does its thing, whatever that is, and then they will communicate with a person on my staff.

Q. Is it always the same person?

A. It is. It's an individual named Bruce Bourque who is a project director for us and who is generally in charge of Penn Station real estate activities. It goes from Bruce through our departmental chain of command, Bruce reports to a Mr. Donald Prost who is the director of real estate development who in turn reports to me. Therefore, since our arrangements call for prior approval by Amtrak of all copy, whatever it says, something like that, for the Spectacular, it comes in from TDI to Bruce through the chain and eventually ends up on my desk for my signature.

Q. "Through the chain" meaning Mr. Prost?

A. Yes.

Q. And then to you?

A. That's right.

Q. How does the system differ for an advertisement anywhere else in Pennsylvania Station?

A. We do not call for prior approval for things other than the Spectacular. Spectacular is different from the rest.

Q. Is there any written material that accompanies the review of a Spectacular advertisement?

MS. WINKLER: When you say written material, what do you mean?

BY MS. PHARES:

Q. Comments, a signature page, is there a sign-off page? Are there comments made accompanying the report, any kind of document?

A. Well, there is not a formal or rigid process. Eventually it hits my desk and there is—I'm trying to think what accompanies it. I don't recall. We don't do many of these. The signs stay up there quite a while. It hits my desk and I say yea or nay. It may or may not even be a formal signature process.

Q. Well, do you have any way of knowing what the two people beneath you in the chain of command have thought about the advertisement?

A. Yes.

Q. How do you know that?

A. They tell me or give me a note one way or the other.

Q. And is the note ever extensive with their opinions or considerations with respect to taking the advertisement?

MR. SLATTERY: Objection. Ambiguous.

A. In regards to the Spectacular you're talking about?

Q. Yes.

A.I don't recall them ever being terribly extensive, no.

* * *

[47:2 - 48:25] that correct?

A. No, I don't think it is correct. He obviously makes recommendations based on his own good judgment. He may in

fact have a personal view contrary to my views and he would probably express them, but I don't know how he arrives at a particular judgment. He's been in that—he's got 20 years of experience.

Q. So ultimately, the standard of whether or not an advertisement is approved just depends on the good common sense of you, Mr. Bourque and Mr. Frost?

MR. SLATTERY: Objection. It mischaracterizes the witness' testimony.

You can answer the question.

THE WITNESS: I forgot the question.

(The record was read as requested.)

THE WITNESS: Recommendations are made by Mr. Bourque through Mr. Prost to my desk. Ultimately I make the decision based on the policies that we have established and my judgment as to the applicability to those policies.

BY MS. PHARES:

Q. And when you say the policies that we have established, it's those standards that you described earlier; is that correct?

A. Yes.

Q. Those are indeed standards that were made before your time at Amtrak; is that correct?

A. Well, there were policies that were discussed that were in existence when I came and we have continued those policies, yes.

Q. Now, am I correct that you said earlier that other advertisements in Penn Station do not have to be approved?

A. No prior approval.

Q. No prior approval?

A. Yes.

Q. In other words, they may be disapproved after they are put up?

A. It's possible, yes.

Q. So the only advertisements that you approve beforehand for Penn Station are those in the Spectacular?

A. Correct.

Q. And how is your final decision documented?

* * *

[50:3 - 50:11] Q. Have any of the standards or policies for advertising changed since you've—in the time you've been at Amtrak in the last ten years?

A. I don't think so, not that I can think of.

Q. The standards have been the same over that entire period?

A. I believe so.

* * *

[55:2 - 57:25] it. Both.

Q. In those decisions that have reached you're desk, do you know of other rejections of Spectacular advertisements that were made before reaching your desk?

A. No.

Q. So that was just a manner of speaking?

A. Uh-huh.

Q. All right. Does anyone else in your department have the ultimate authority to reject a Spectacular advertisement?

A. Well, I have the ultimate authority. Only I unless I delegate that authority.

Q. Have you ever delegated it?

A. I have delegated my authority when I go out of town on all matters.

Q. And if the decision is made in your absence by your delegate, does the person reject the advertisement in his or her own name or in yours?

A. Mine.

Q. Were you the person ultimately responsible for the rejection of the advertisement in this case?

A. Yes, although the actual letter was signed by someone acting for me.

Q. So the fact that it was signed by someone else in this instance doesn't mean that you had delegated that authority in your absence?

A. Indeed. That's exactly what it means.

Q. You had delegated the authority to write the letter?

A. Right.

Q. Had you delegated the authority to make the decision?

A. I don't know how I can do one without doing the other. Of course.

Q. So a moment ago when you said you had the ultimate authority, you had the ultimate authority, but in this particular case it was exercised by someone else to whom you had delegated the authority; is that correct?

A. I had delegated authority for a particular period of time, a day or several days, whichever it was. During that time frame which is a written piece of paper which I prepare and sign, that individual whomever I name in that particular memo has full authority to act as if I was there and to act in my name, and he would always sign Mr. Smith for Mr. DeAngelo.

Q. Did you personally reject the ad that's involved in this case?

MR. SLATTERY: Ambiguous. Are you talking about whether he made the decision?

MS. PHARES: Yes.

THE WITNESS: Yes, I did

BY MS. PHARES:

Q. Do you apply any different advertising standards with respect to the Spectacular than you would apply if another advertisement were brought to your attention?

A. I think I have to give a more than one-word answer to that. The Spectacular is very large, very prominent, very visible to many people. Anything that goes on there has a very dominant position within the Penn Station and therefore within 38 percent of our passengers, and because of its size and it's brilliance in terms of candle power, it's something which we

* * *

[59:20 - 62:3] Q. All right. Earlier you described one of the standards of the standards that you included as something that might be objectionable to your riding public. How is that defined?

A. It is not in writing. Is that the question?

Q. Well, you earlier told me it's not in writing. Do you have any guidance for interpreting whether or not an advertisement is objectionable to the riding public?

A. There is no written guidance, no.

Q. And what do you use for guidance when you are required to make a decision about an advertisement as to whether or not it is objectionable to the riding public?

A. I use several things. Before it reaches me, it would go through the staff and I'd have their views. It would reach my desk and I use my 40 years of experience to help make a judgment and if I didn't feel comfortable with doing that I would check with other people in the corporation whose views I would respect.

Q. With whom would you check?

A. It depends on the issue, but it could be anyone of 24,000, that's the number of people we employ.

Q. Would you refer a standard like that to the board of directors or to any—

A. (Witness shaking head.)

Q. No?

A. I'm not referring it to anybody. I'm merely in that particular illustration asking people's views.

Q. Well, you make the final decision about these advertisements. What does "objectionable to the riding public" mean to you?

A. Issues that would cause our passengers to be concerned and upset to write letters to us, to talk about it amongst themselves and things which they would find inappropriate for Amtrak to be a part of.

Q. And does it matter what proportion of the riding public might find an advertisement objectionable?

A. I don't know how I would know that.

Q. So if any member of the riding public might find an ad objectionable, is that grounds for rejection?

MR. SLATTERY: Any kind of ad now?

MS. PHARES: Yes, any kind of ad.

THE WITNESS: I mean my guess is, I could almost say anything like I want a turkey sandwich for lunch, and find

someone who doesn't think that is a good idea, so I would submit, no, the grounds for objection is my judgment as to the issue.

* * *

[70:9 - 71:6] Q. Now, one thing I want to clarify. Aside from the prior approval issue for the Spectacular that you described earlier, are the standards for advertising the same for the Spectacular and other advertisements in Penn Station?

MR. KOHANE: I believe that's asked and answered, but go ahead.

MR. SLATTERY: I'm gong to make the same objection. You can answer the question.

THE WITNESS: Well, as I indicated earlier, the standards would be the same, but the Spectacular being the prominent brightly lit thing that it is gets much closer attention than do other things.

BY MS. PHARES:

Q. Do you mean by that there is a stricter standard of review for the Spectacular?

A. No, I mean by that it is a prior approval process and it's one which we take a close look at and look at very carefully.

* * *

[76:2 - 78:25] whatever the case may be, and then appropriate actions be taken. Through that route, no one has ever come to me and said, This ad is anything.

Q. Now, given the standards that you had described earlier, does an advertisement that is objectionable to Amtrak's riding public include advertisements for religious organizations?

A. We would take exception to anything that was non-commercial.

Q. When you say you would "take exception to," what do you mean?

A. Well, if it was in the Spectacular where we had the right of prior approval, we would insist that we have a commercial message. That is, advertising, promoting a product or service.

Q. And what about elsewhere in Pennsylvania Station?

A. Well, that's where we don't have prior approval there.

Q. If an advertisement regarding a religious organization were brought to your attention, would that be grounds for removing it?

MR. SLATTERY: Objection. Ambiguous.

You can answer.

MS. PHARES: Let me rephrase it. I'll try again.

MR. SLATTERY: Sure.

BY MS. PHARES:

Q. If an advertisement is complained of on the grounds that it portrays a religious message, do you consider that grounds for removing it from Pennsylvania Station, a non-Spectacular ad?

A. That's never happened. I would have to review it when it happened.

Q. But if an advertisement has a religious message, but also purports to sell a product, then you consider that advertisement a commercial advertisement?

MR. SLATTERY: Objection. Ambiguous and it calls for speculation.

A. I would have to look at the circumstances. I can't answer.

Q. Do you know if there are advertisements in Pennsylvania Station which include as part of them material that is given away?

A. I believe they do.

Q. Are there any different standards for evaluating such advertisements?

MR. SLATTERY: Objection. Ambiguous.

You can answer.

A. Not that I'm aware of. We have never employed any.

Q. Would you accept an advertisement which relays a non-commercial message on behalf of a commercial advertiser?

MR. SLATTERY: Objection. It calls for speculation.

A. Yes, I agree, I wouldn't know how to answer that. I need to see it.

Q. Are you familiar with the Worldwide Church of God?

A. No.

Q. Are you aware that there is an advertisement for the Worldwide Church of God in Pennsylvania Station at the present time?

* * *

[81:19 - 82:12] MS. PHARES: All right. Now, I think what I would like to do is mark as Plaintiff's Exhibit Number 2 a station advertising agreement by and between National Railroad Passenger Corporation and Transportation Displays, Inc. dated March 15th, 1991.

(AGREEMENT BY AND BETWEEN NRPC AND TDI MARCH 15, 1991 MARKED PLAINTIFF'S EXHIBIT-NUMBER 2 FOR-IDENT.)

(Discussion off the record.)

BY MS. PHARES:

Q. Have you ever seen Plaintiff's Exhibit 2, Mr. DeAngelo?

A. I probably have. I say "probably" because it was signed for me by someone else, so I did not see it at that point in time, but typically when things are signed in my absence, I have a copy which I read on my return.

* * *

[86:16 - 88:24] Q. All right. Can you please point out to me in the contract the standards that you referred to earlier that you stated were in the TDI contract?

A. Well, give me a few minutes to read it.

Q. Certainly. Well, you stated earlier that the standards that you described—the only place they were set out were in the TDI contract; is that correct?

A. No, that's not correct.

Q. Are they set out someplace beside the TDI contract?

A. No, not to the best of my knowledge.

Q. Are you saying they are not set out in the TDI contract?

A. No, I have to read this particular contract, but what I did say earlier was TDI had arrangement for prior approval

of the the Spectacular, that's what I said. And we also had not just with Spectacular otherwise, that's what I'm looking for in here now, but we have the right, I believe, to reject.

Q. Well, let me refer you, if it helps you, to section 6 on page 4.

A. Oh. Thank you. Yeah, that's what I was looking for. Thank you. Exactly what I was looking for. That's what I was referring to.

Q. All right. You are referring particularly, am I correct, to the first two sentences of that section?

A. I am.

Q. And in those two sentences, I'm not trying to be tricky, I'm trying to save some time, that it says that "advertising material shall be subject to approval by Amtrak which may disapprove any such items at its own discretion," correct?

A. Correct.

Q. "And TDI will immediately remove at its sole expense upon the written demand of Amtrak any advertisement which may be considered objectionable by Amtrak."

A. That's right.

MR. KOHANE: The contract speaks for itself.

BY MS. PHARES:

Q. All right. Now, so far as you know, is any other standard for what is acceptable to Amtrak conveyed to TDI other than in this contract?

MR. SLATTERY: Objection. Ambiguous and no foundation.

BY MS. PHARES:

Q. You may answer witness.

A. I know of no other written communication of any kind.

* * *

[103:5 - 106:25] (IN-STATION ADVERTISING AGREEMENT DATED DECEMBER 1, 1985 MARKED PLAINTIFF'S EXHIBIT-NUMBER 3 FOR-IDENT.)

(PERMIT FOR ADVERTISING DISPLAY FACILITY DATED AUGUST 15, 1980 MARKED DEANGELO EXHIBIT-NUMBER 4 FOR-IDENT.)

(Discussion off the record.)

BY MS. PHARES:

Q. Mr. DeAngelo, I have a couple of questions about these documents. If you would refer first to what has been marked as Plaintiff's 3.

A. (Witness nodding.)

Q. Are you familiar or do you recognize this contract?

MR. KOHANE: Note my continuing objection to questions based on Plaintiff's 3 and 4 based on relevance.

MR. SLATTERY: Let me note also in the record in producing all of these documents we reserve the right to object on relevance grounds. We will attempt to limit the need to do so.

THE WITNESS: Yes, I've signed it and I've seen it.

MS. PHARES:

Q. So is it your signature on page 12 that appears above the line that says assistant vice president, real estate?

A. It is.

Q. Did you negotiate this agreement?

A. I was involved, but I didn't really negotiate it.

Q. Did you need approval from a superior before signing the agreement?

A. I'm not certain. I'd have to check.

Q. On what do you—I noticed that you were leafing through the document in order to decide whether or not. On what is the basis whether you needed approval?

A. The issue I was concerned and looking for was whether it was basically an extension of an existing agreement or brand new agreement. If it was an extension of an existing agreement, I could sign on my own authority; if it wasn't, I would probably take it to my board of directors.

Q. And the reason you're not sure is what?

A. Well, I would have to see what the previous agreements were and see if it was consistent.

Q. Well, I can help you if you turn to Plaintiff's 4. In particular, if you look at paragraph 4 of Plaintiff's 3 which says this agreement cancels and supersedes a prior agreement dated—

A. Paragraph 4 of Plaintiff's 3?

Q. Section 4 of Plaintiff's 3 which recites it cancels and supersedes an agreement dated August 15th, 1980.

A. Uh-huh. I'm not sure if I did on my own authority or took it to my board of directors. I'm not certain.

Q. How would you check if you were going to verify that?

A. If I was going to verify it, I would look back through the minutes of the boards of directors meetings and see if I took it there or not.

MS. PHARES: We have asked for the production of minutes of the board of directors relating to advertising. If they haven't been produced, should I assume there aren't any?

MR. SLATTERY: I don't have your document request in front of me so I don't know whether that is the case or not.

If you are making a statement now that you want those minutes produced, I will be happy to get back to you as to whether or not we are willing to produce them and if in fact documents that are responsive to your request exist.

MS. PHARES: I know you represent yourself being privy of my conversation with Mr. Landman, but I would like it to be clear we are interested in any minutes of the board of directors or any of its committees relating to any of Amtrak's contracts or policies relating to advertising, and specifically advertising at Penn Station.

(Pause in the proceedings.)

* * *

[107:11 - 109:12] Q. Mr. DeAngelo, on page 10 of Plaintiff's 3 there is a section 29 regarding nondiscrimination. Does Amtrak insert a paragraph like that in all of its advertising contracts?

MR. SLATTERY: Objection. No foundation and also ambiguous.

BY MS. PHARES:

Q. But you are permitted to answer.

THE WITNESS: Am I?

MR. SLATTERY: I'll put my hand over your mouth if you can't answer.

THE WITNESS: I keep looking for guidance.

MR. SLATTERY: I will tell you if you can't.

THE WITNESS: I think that is a standard clause in more than just advertisement contracts.

BY MS. PHARES:

Q. Do you know why it is inserted in at least advertising contracts, but maybe other contracts?

MR. KOHANE: Objection.

MR. SLATTERY: No foundation, speculation and also no relevance.

MR. KOHANE: It calls for a legal conclusion.

MR. SLATTERY: And I will join in that objection.

BY MS. PHARES:

Q. But you can answer the question.

A. I assume it's included as a matter of corporate policy.

Q. Turning to Plaintiff's 4, I realize this contract was signed before you were with Amtrak, but do you recognize the contract?

A. I do.

Q. Was this the contract that was in effect when you came to Amtrak?

MR. SLATTERY: Objection. It calls for a legal conclusion.

A. I believe it was.

Q. And was Kurt Weissheimer, your predecessor?

A. Yes.

Q. And it was Kurt Weissheimer who signed on behalf of Amtrak; is that correct?

A. That is correct.

MR. KOHANE: Objection.

* * *

[114:2 - 114:25] Q. In Plaintiff's 5, there is a notation of an enclosure.

A. Uh-huh.

Q. Is it your understanding of what was enclosed was the copy for the advertisement for which TDI was seeking Amtrak's approval?

A. I would assume that from the language of this letter.

Q. And do you understand that that's what was shown to you whenever it was that you saw it?

A. I believe so.

Q. And why did you reject the ad?

A. It was not a commercial contract as we discussed earlier. It was not promoting a service or a product.

Q. Was that the reason you rejected it?

A. Uh-huh.

Q. How did Mr. Bourque describe the ad to you?

A. Well, I'm trying to remember. I can't recall precisely. I just can't do it. He made reference to the fact that it was talking about the Coor's people, talking about several

* * *

[128:2 - 134:4] Q. Do you know whether or not the board members have been informed of this lawsuit?

A. I'm not aware that they have been.

Q. And when does the board meet in the month of January?

A. The fourth Wednesday which is—do you have your calendar there? Whatever the fourth Wednesday is.

Q. So that would be January 28th?

A. If that's the fourth Wednesday, that's when it would be, yes.

Q. And when was the November/December meeting?

A. December 1st.

Q. That makes sense.

A. Well, actually—sorry. December 2nd. December 1st were committee days, December 2nd is the board days.

MS. PHARES: All right. Now, I'm going to mark as Plaintiff's 7 the most recent copy of Amtrak's annual report with which we have been provided which is 1991.

(AMTRAK ANNUAL REPORT FOR 1991 MARKED PLAINTIFF'S EXHIBIT-NUMBER 7 FOR-IDENT

BY MS. PHARES:

Q. Before moving directly to discussion of this exhibit, how are the revenues from advertising used?

A. How are they used?

Q. Yes.

MR. SLATTERY: Objection. Lack of foundation.

BY MS. PHARES:

Q. Well, are there any revenues from Amtrak's advertising?

A. There are.

Q. Glad to hear it. How are those revenues treated when they are earned?

MR. SLATTERY: Same objection.

You can answer.

A. They are treated as revenue and goes into the general revenue fund.

Q. Okay. Now, is it accurate to say that Amtrak's operating and capital is subsidized by the federal government?

MR. SLATTERY: Objection. For foundation and for relevance.

MR. KOHANE: And to form.

MR. SLATTERY: You can answer the question.

I'll join in the form objection.

THE WITNESS: Yes.

BY MS. PHARES:

Q. Do you participate at all in the preparation of reports that are made to Congress?

A. Only to the extent that I prepare for a section of the report I give for my department.

Q. For real estate?

A. Right.

Q. And do you know what reports are prepared for Congress?

MR. SLATTERY: Objection. Ambiguous, but you can answer it.

A. Not really. I know there are reports that go out. I don't know exactly what they are, I don't pay that much attention to them.

Q. Are you personally familiar with how the subsidies for Congress are allocated?

A. In a general sense I am.

Q. Would you describe in that general sense how they are allocated?

A. Yes. There is two types of funds. Capital funds and operating funds. Operating funds, each year the corporation prepares an operating budget. That operating budget is done in consideration of anticipated revenues for that year. We are obligated by policy commitment to achieve each year a certain revenue cost ratio; that is, the percentage of the total operating costs of the corporation that we achieve through our own efforts as opposed from a subsidy from Congress.

Therefore, when we prepare the budget for the corporation, if we know that the revenue cost ratio is going to be 79 percent, that is the commitment. If we estimate what our revenues are going to be, X, then our revenues must equal 79 percent of total cost, so you have your revenue estimates and you have your percentage, then you determine the total amount of operating cost you can have and still achieve that revenue cost ratio. That then sets the budget for the entire corporation.

Then there is a process managed by the finance department by which they obtain a budget from each of the departments within the corporation.

Q. And to the extent that Amtrak is unable to achieve its total operating costs from its revenues, it seeks to make up the difference from Congress; is that correct?

A. That's correct.

Q. So, to the extent that Amtrak is able to increase its revenues, it is similarly capable to decrease the request of subsidy from Congress; is that correct?

MR. SLATTERY: Objection. Foundation and speculation.

A. The answer is yes.

Q. Early in your answer, you referred to the policy in which Amtrak attempts to achieve the particular percentage. By whom is that policy set?

A. I believe by our president.

Q. Is the policy set in order to reflect a directive from Congress?

MR. SLATTERY: Objection for foundation.

BY MS. PHARES:

Q. If you know.

A. I don't think so. I think—I don't think so.

Q. Okay. If you turn to page 26, if you would, of Plaintiff's 7. In particular, to the second full paragraph on the page.

A. Got it.

Q. There is a reference in that paragraph to the Railroad Retirement Tax Act.

A. Uh-huh.

Q. And the Railroad Unemployment Repayment Tax. Do you know what that refers to?

MR. SLATTERY: Objection for foundation.

You can answer the question.

A. In a very general sense, but I wouldn't want to be held out as an authority for the subject.

Q. All right.

A. Prior to this particular fiscal year, Amtrak itself was obligated to make this deposit with the IRS from reading the sentence, and Amtrak argued and Congress agreed that that payment should be made directly by the Railroad Administration and not from Amtrak because that had an impact on this revenue cross-ratio.

* * *

[135:11 - 138:19] Q. Mr. DeAngelo, the authorization for Amtrak is set out on page 26 for fiscal year 1992. Do you happen to know what the authorization is for fiscal year 1993?

MR. SLATTERY: Objection for foundation.

A. What do you mean by "authorization"? Dollars?

Q. Yes.

A. Appropriations Or authorization?

Q. Appropriation.

A. I don't know what it is for this fiscal year.

Q. Do you know whether its larger than $711 million?

A. No, I don't.

Q. Do you know whether or not Amtrak pays real estate taxes on its real estate?

A. Yes, I do know.

Q. Does it?

A. No, it does not.

Q. That means that Amtrak does not pay real estate taxes on Penn Station?

A. That's correct.

Q. It doesn't pay real estate taxes on any of the track that go through New York state?

A. That's right.

Q. Why not?

MR. KOHANE: Objection.

MR. SLATTERY: Objection for foundation and calls for legal conclusion.

THE WITNESS: Through an act of Congress.

BY MS. PHARES:

Q. Does—let me put it this way. If it earned a profit, would Amtrak pay income taxes?

MR. SLATTERY: Objection. Foundation, speculation, calls for a legal conclusion.

A. We would love to. The answer is I believe that to be the case and we would dearly love to be in that position.

Q. So far as you know, has Amtrak ever paid income taxes.

MR. SLATTERY: Same objections.

A. Amtrak has never paid income taxes.

Q. Does that include federal, local and state income taxes?

MR. SLATTERY: Same objections.

A. I don't know about ever in that connection. You're now referring to income taxes alone or all taxes?

Q. Income taxes alone.

A. To the extent that local authorities require one to make a profit before one pays income taxes, I'm sure that is the correct answer.

Q. What you're saying is Amtrak has never made a profit; is that correct?

MR. SLATTERY: Objection. Foundation.

THE WITNESS: That's correct.

MS. PHARES: Off the record.

(Discussion off the record.)

BY MS. PHARES:

Q. What is the relationship between the Federal Railroad Administration and Amtrak?

MR. SLATTERY: Objection for foundation and relevance grounds.

You can answer.

A. The Federal Railroad Administration is that federal agency through which our federal funds flow and through which we have a lot of dealings because, for example, they are responsible for railroad safety including Amtrak and other railroads as well, and they are responsible for promotion and safety and other parts of the railroad industry, so we have a lot of dealings with them on a regular continuing basis.

* * *

[140:19 - 154:15] MR. SLATTERY: Objection for foundation and speculation, but you can attempt to answer the question if you know the answer.

A. Well, I could not explain this particular number.

Q. You cannot?

A. No.

Q. Does your department—let me put it this way. Is revenue earned by your department through the operations of your department?

A. Is there revenue earned?

Q. Yes.

A. Yes.

Q. From what?

A. A variety of things.

Q. Such as?

A. Leasing of retail stores in stations, telephones in stations and elsewhere on our property, the leasing and/or sale or granting of easements for other property that we own, for licenses we give to utility companies to either run along side of or cross our right of way for the purposes of putting in utility lines for or things of that nature, for advertising and similar types of things.

Q. Does the revenue that is earned through the operations of your department include for example the lease at Penn Station to the Long Island Railroad?

A. That's going to take a long time to answer that. That's not a yes or no answer.

Q. Well, you don't have to answer it yes or no.

A. Okay. I'll give you the long answer.

The Long Island lease arrangement called for payment of $45 million, more or less, roughly. The corporation received that $45 million at that time which was five years or so ago.

The corporation put that money into an account, I believe a separate account, and then it was taken as revenue to the corporation as that money has been expended for the construction of a centralized traffic control system in New York in joint venture with the Long Island Railroad.

Q. Do you know is the Long Island Railroad a part of the New York Metropolitan Transit Authority?

A. It is.

Q. Is the payment that you are referring to the same payment that is indicated on page 31 of Plaintiff's 7?

MR. SLATTERY: Objection. For foundation and speculation.

A. Where is that on that page?

Q. On page 31 under note 9.

A. I see it. That's correct. It even says what I just said. Isn't that nice.

Q. Perhaps you know more than your counsel thinks you do.

And when you refer to easements as being a source of revenue in your department, does that revenue also include easements at Pennsylvania Station?

A. Probably. Probably.

Q. Probably yes?

A. Probably yes.

Q. Are those the kinds of easements that you described earlier relating to the subway or would these be the kind of easements that you just described relating to utility companies or both?

MR. SLATTERY: Objection. Ambiguous.

You can answer.

A. What I have in mind was we granted a series of easements to the Long Island Railroad in addition to this lease. And some of these easements were at no cost, some were at a cost and that's what I was thinking of in response to your question.

Q. Fine. Now, I have another question. I'm not asking you a personal question, and I don't need the specifics, is the salary of employees of Amtrak tied to the federal salary scales in any way?

MR. SLATTERY: Objection for speculation, foundation and relevance.

You can answer.

A. No.

Q. Do you know whether or not Amtrak pays Social Security?

A. Amtrak as a corporation?

Q. Yes.

A. I believe they do not.

Q. Do Amtrak employees have Social Security withheld from their wages?

A. No.

Q. Do they have some sort of retirement monies withheld from their wages?

A. Yes.

Q. And do you know into what fund that is paid?

A. Yes.

Q. What is that?

A. RRTA which I believe is Railroad Retirement something something.

Q. Okay. Is the Amtrak telephone system tied in with the federal telecommunications system?

A. No.

Q. Does Amtrak have its own telecommunication system?

A. Yes.

Q. And does an ATS in front of an Amtrak number refer to the Amtrak telecommunication system?

A. It does.

Q. Does Amtrak lease any property from the federal government?

MR. SLATTERY: Objection for relevance and for foundation.

You can answer it.

A. I don't think so. I can't think of any offhand. We lease a lot of property. Offhand I cannot think of any that we lease from the federal government—

Q. Does Amtrak—

A. —directly.

Q. You mean you—

A. Well, I say that because I told you earlier, this facility we are in right now is owned by the federal government, leased to the Union Station Redevelopment Corporation which in turn subleases to LaSalle partnership who in turn leases it to us, so in that link there is a role there, but it is not direct.

Q. I see. Is there any other similar indirect leasing of stations along the Northeast Corridor?

A. That is leased from the federal government?

Q. That's correct.

A. I can't think of any.

Q. Are there any leases of property from states along the Northeast Corridor?

MR. SLATTERY: Objection for relevance.

You can answer.

A. I'm trying to think. I can't think of any. I can't think of any from states. I can't think of any.

Q. Local governments?

MR. SLATTERY: Same objection.

You can answer.

A. Yes.

Q. Which local governments?

A. Now you're really going to make me think. I'm not really sure what the precise entity is whether it is a local government per se, that is a city or whether it is some sort of authority that has been created by one or more local governments or what, so I'm not sure what entities we're talking about, but we lease space in a station from a local entity of some sort.

For example in New Haven, Connecticut, we do. I think of that one. In Newark, New Jersey we do. I can think of that one. Trenton, New Jersey. That might even be—it's not the state, but it may be a creature of the state. I'm not sure in the case of New Jersey. They are the ones that I can think of from the top of my head.

MR. KOHANE: It seems the answer may have included legal conclusions, so I move to strike.

MR. SLATTERY: Let me note for the record, although we allowed some leeway here, I cannot conceive of any possible relevance about the state or local relationship with Amtrak, and have therefore objected to them and hope we will be able to move on to more relevant topics.

BY MS. PHARES:

Q. Do you know how much Amtrak made in advertising in 1991?

A. No.

Q. Do you have any estimate?

MR. SLATTERY: Objection for ambiguity. Are you talking about all advertising?

MS. PHARES: Station advertising.

THE WITNESS: Your question is do I have an estimate?

BY MS. PHARES:

Q. Yes.

A. I would say it's in the hundreds of thousands of dollars.

Q. Would you say over $500,000?

A. You're now limiting this to station advertising; is that correct?

Q. Well—

A. I'm not trying to be cute, I want to know what you're talking about.

Q. Well, maybe what I should ask you first is what other advertising do you have? There is station that I am aware of. Right of way advertising.

A. Uh-huh.

Q. And I'll exclude any advertising if any within a train.

A. Well, there is none. Then there is billboards. I don't know if that's what you meant by right of way or not.

Q. That's what I meant.

A. Billboard and station, those are the two distinctions.

Q. If you can estimate the two separately for 1991.

A. Well, okay. Strictly an estimate from the top of my head, I would say it is probably in the range of several hundred thousand, probably for both of them. Somewhere in that range.

Q. And several hundred thousand—

A. Could be 3 or 400,000, something like that.

Q. For each of them?

A. Yeah.

Q. I'm not asking for a specific figure. I want just a range.

A. Yeah.

Q. So in total, you're saying—we're talking about maybe from 6 to $800,000 total?

A. Something like that. It could be more or less. That's my best estimate.

Q. Does your department make imminent domain decisions?

MR. SLATTERY: Objection.

A. It all depends on what you mean by "make decisions."

Q. Well, do you have the ultimate authority for the making of imminent domain decisions for the Amtrak railroad?

MR. SLATTERY: Objection. Ambiguous.

A. We make the real estate decisions, yes.

Q. That's what I'm referring to.

A. We make the real estate decisions.

Q. Is the ultimate authority for real estate imminent domain yours?

A. Yes.

MR. KOHANE: You mean within Amtrak?

MS. PHARES: Yes.

MR. KOHANE: He's not on the bench.

BY MS. PHARES:

Q. Are those decisions reviewed by the board?

A. You're talking now where I exercise the right of imminent domain to purchase property?

Q. That's correct?

A. They could be depending on the amount of money involved.

Q. Is there a threshold above which you are required to report to the board?

A. There is. Now you're going to ask me what it is and I don't remember. It's a number and I just don't recall the precise number.

Q. Once again, could you give me an estimate? Is it $100,000?

A. It's probably like $500,000, something like that.

Q. Okay. And if there is a decision to sell property, real estate, is that a decision made by your department as well?

A. Yes.

Q. And similarly, whether or not you have to report that to the board, it's set by a certain threshold amount?

A. No. All sales receive board approval prior to the sale.

Q. I take it you can't sale Pennsylvania Station without the board's approval?

A. That's right. Without risking my neck.

MR. SLATTERY: You anticipated my relevance objection.

A. Although I've been tempted. Like right now.

Q. Do you know how much Penn Station is worth?

A. Excuse me?

Q. Do you know how much Penn Station is worth?

A. I thought you said how much temptation is worth. I have not the foggiest idea.

Q. Are there any mortgages on Penn Station?

A. Yes.

Q. And who are the mortgagees?

A. The federal government.

Q. In what amounts?

A. It's a mortgage for the entire Northeast Corridor including Penn Station, and I forget the number, but it's in the hundreds of millions of dollars.

Q. And do you know when those mortgages were put on the property on the Northeast Corridor?

A. Yes.

Q. When?

A. When it was acquired. As I testified earlier, either '76 or '77.

Q. Has Penn Station ever been appraised to your knowledge?

A. To my knowledge it has never been appraised.

Q. To your knowledge has there ever been a proceeding to evaluate the worth of the properties in the Northeast Corridor?

A. The total property in the Northeast Corridor?

Q. Yes.

A. No, not to my knowledge.

Q. Do you know from whom Penn Station was conveyed to Amtrak?

A. There was a chain which included Conrail. It went from the previous owner through Conrail to Amtrak.

* * *

[156:3 - 157:21] Q. Okay. Now, we had discussed earlier U.S. corporate income tax returns. Do you know whether or not Amtrak has ever filed any state or local tax returns?

MR. SLATTERY: Objection. Relevance and foundation. You can answer.

A. I believe we have.

Q. Okay.

A. But I don't know that for a fact. I'm not involved in that.

Q. Well, we have asked for production of income tax returns and I will just note for the record that we have not received any state or local tax returns. If there are any, we ask for production then—

A. Excuse me. Are you talking about income tax alone?

Q. Yes.

A. No, I do not believe we ever—well, I don't believe we ever paid income taxes. Returns, I don't know.

Q. That's different.

MR. SLATTERY: I will note the objection and also note that I cannot conceive of the possible relevance—I will note the request and note that I cannot conceive of the relevance, but I will see if I can get an answer to it, assuming we don't object to it and it may be something we can stipulate to.

MS. PHARES: I was going to say: Mr. DeAngelo has testified that there has been no state or local income tax paid and—

MR. KOHANE: Did he?

MR. SLATTERY: I don't think that is the testimony.

THE WITNESS: To the best of my—the reason I say that is because we never made any profits, therefore I assume we didn't pay any taxes, unless there is some jurisdiction that requires taxes paid on losses which I'm not aware of. That's strictly income tax. There are other types of taxes.

* * *

[158:8 - 165:12] Q. Who polices Amtrak's terminals?

A. Polices? In terms of security?

Q. That's right.

A. As opposed to cleaning up trash?

Q. Security.

A. We have a police department.

Q. And do the employees of your police department also serve under or are they designated as police officials of any state or local government?

MR. KOHANE: Objection.

MR. SLATTERY: No foundation.

MR. KOHANE: Legal conclusion.

MR. SLATTERY: I'll join in the legal conclusion.

THE WITNESS: No, they do not to the best of my knowledge.

BY MS. PHARES:

Q. Are any other railroads considered competitors of Amtrak?

A. No.

Q. Is that just because of the nature of where the lines run?

A. No.

Q. Are there other railroads?

A. There is no other inner-city passenger railroad.

Q. Except Amtrak?

A. Well, there is no other which implies—

Q. Why is that?

A. My guess is—

MR. SLATTERY: Objection for foundation.

MR. KOHANE: And I think it calls for a legal conclusion, but we'll see.

THE WITNESS: I don't know of anyone that wants to get in a business that's unprofitable.

BY MS. PHARES:

Q. Do the Amtrak security police have authority to make arrests?

MR. KOHANE: Objection. It calls for a legal conclusion.

MR. SLATTERY: I join in that objection, also I object on grounds of foundation.

THE WITNESS: The question was again?

BY MS. PHARES:

Q. Do they have authority to make arrests?

A. They do make arrests. I don't know the basis for that. I do not know what the authority is, but I know they make them.

Q. Do you know whether they carry guns?

A. Yes.

MR. SLATTERY: Objection. Same grounds.

BY MS. PHARES:

Q. And the answer?

A. Yes, they do carry guns.

Q. To whom do the Amtrak police report?

MR. KOHANE: You mean individual officers? Or—

THE WITNESS: You want the title and name?

MS. PHARES: Yes.

MR. SLATTERY: The title and name of somebody within Amtrak?

MS. PHARES: Yes.

THE WITNESS: The chief of police who is Mr. Sardino.

BY MS. PHARES:

Q. Under what particular division or portion of Amtrak is he?

A. He reports to the chief operating officer.

Q. And the chief operating officer is?

A. Mr. Sullivan.

Q. Do you know who owns Amtrak's stock?

A. Yes.

Q. Who?

A. The federal government.

Q. All of it?

A. Yes.

Q. Do you know when Penn Station was acquired by Amtrak what consideration was paid for it?

MR. SLATTERY: Objection. Foundation.

A. It was part of the purchase of the entire Northeast Corridor, so there is not a consideration for pieces of the corridor. The entire amount would be the amount of that mortgage we discussed earlier and I don't know what it is, but it's somewhere in the hundreds of millions of dollars.

Q. So, that was a mortgage that you said earlier was—for which the federal government is the mortgagee; is that correct?

A. Mortgagor.

Q. Is the mortgagor?

A. Whichever one. They hold the mortgage.

Q. They hold the mortgage?

A. Yeah.

Q. Okay. So is it correct then that the consideration paid at the time was paid by the federal government?

MR. SLATTERY: Objection. Foundation.

A. I believe so.

Q. All right.

A. I don't know if it was a cash transaction or in lieu of other things or what, I haven't the foggiest idea. It could have been the settlement of other obligations.

Q. Are you aware of any condition that is imposed by any state, local or federal authorities as a condition of doing business?

MR. KOHANE: Objection.

MR. SLATTERY: Ambiguous.

BY MS. PHARES:

Q. Are you aware of any conditions imposed by the federal government imposed on Amtrak as a condition of doing business?

MR. KOHANE: Objection.

MR. SLATTERY: Objection.

THE WITNESS: I really don't understand where you're coming with that.

BY MS. PHARES:

Q. I am going to ask it a little differently. Does the City of New York impose any conditions on Amtrak's operation of Penn Station?

MR. KOHANE: Objection.

MR. SLATTERY: Objection. Let me note for the record that I am objecting on grounds of relevance and ambiguity.

MR. KOHANE: And I believe it calls for a legal conclusion.

THE WITNESS: We observe a variety of local regulations. Without knowing the legal basis, I assume we are required to, but I don't know that, but we do observe them. There is probably hundreds of them that is imposed by a city on any operator or any business

BY MS. PHARES:

Q. Does Amtrak have to operate in any specific ways in order to satisfy the federal government?

MR. SLATTERY: Objection. Ambiguous and lack of foundation. That calls for a legal conclusion

BY MS. PHARES:

Q. Or does Amtrak have to operate or conduct its operations in its real estate holdings in such a way as to satisfy the federal government?

MR. SLATTERY: Same objection.

A. Well, you are now limiting this to real estate matters, nothing beyond real estate matters as it relates to any federal issue or requirement?

Q. Yes.

A. I'm not aware of any.

Q. Okay.

A. Other than as federal law would apply to any piece of real estate, i.e., an environmental law or something like that, but I don't know of anything specifically aimed at Amtrak.

* * *

[177:19 - 181:14] Q. Now, one question I have which perhaps you have answered, but since I'm not so familiar with the easements of Penn Station, so I will ask again.

Are there easements between either the MTA/Long Island Railroad or the subway to permit pedestrian access through Pennsylvania Station to respectively the Long Island Railroad or the subway?

A. Well, there are a number of leases which I signed, therefore I am familiar with them, since I've been here which go to such things as allowing the Long Island Railroad/MTA to construct certain things or have access through our area to construct certain things, I am familiar with those. I'm not personally familiar with easements that went to the issue of pedestrian traffic connecting the subway system with our station. I imagine they exist, but they would have been done many, many years ago prior to Amtrak's existence and certainly prior to mine involvement.

Q. And therefore would have been conveyed as operating leases along with the conveyance of Pennsylvania Station itself?

MR. SLATTERY: Objection for speculation, foundation and calling for a legal conclusion?

A. I would expect so.

Q. Without asking a legal opinion, that's your understanding?

MR. SLATTERY: Same objection.

A. I would be surprised if it were not so.

Q. And does Amtrak receive compensation from either the Long Island/MTA or a city authority, subway authority for any of these easements?

A. It has. I'm not sure it still does. I think usually those payments for easements are usually a lump sum, up-front payment.

MR. SLATTERY: When you refer to these easements, were you referring to the easements that Mr. DeAngelo testified that he was aware of the existence of and not the ones he wasn't sure about?

MS. PHARES: We will let the record speak for itself.

MR. SLATTERY: Okay. Let me say that's not the way I interpret it.

THE WITNESS: I answered that what I thought to be the question.

BY MS. PHARES:

Q. Well, whether we are referring to the leases that you signed personally or those which you testified you believed to

exist but preexisted your time at Amtrak, am I correct that any payment or your understanding is that the payment of such easements or leases are made usually when the lease is made?

MR. SLATTERY: Objection to speculation to the extent it requires the witness to testify about easements he is not aware of the existence of.

You can answer the question?

A. In our case, it is usually an up-front, lump sum payment in a case of this nature.

Q. And the leases that you have signed, do you recall whether they have been for no consideration or minimal consideration or not?

MR. KOHANE: Wait. I'm sorry. You're talking about easements or leases?

BY MS. PHARES:

Q. I beg your pardon. For the easements, that you described being familiar with because you had signed them, were these easements for which Amtrak receives any significant consideration?

A. There is both.

Q. And can you give me an estimate of the amount of the consideration?

MR. SLATTERY: We're talking about total consideration or consideration on a particular contract?

MS. PHARES: Total.

THE WITNESS: It would just be gross speculation on my part. I can't recall that. This is over a period of time and I sign hundreds of documents in the course of a year. I can't remember that.

* * *

[182:9 - 188:9] Q. Am I correct that you said the lease for the Long Island Railroad was entered into about five years ago?

A. Five or six years ago, something like that.

Q. And before that, did Amtrak operate or control the A level of Penn Station?

A. Yes, it did.

Q. And at that time did the Long Island Railroad operate through the station?

A. Yes.

Q. What was the relationship between Amtrak and the Long Island Railroad?

A. Difficult.

Q. Would you be a little more specific.

A. I'm not sure of the precise legal document, but there was some arrangement whereby they had the right to use that space under certain controls as we imposed. I'm not sure of the legal form of that document.

Q. Plaintiff's Exhibit 2 which is the current agreement between TDI and Amtrak—

A. Uh-huh.

Q. —Does it refer only to the B level of Penn Station?

MR. KOHANE: Objection. It speaks for itself.

MR. SLATTERY: Same objection.

THE WITNESS: It would speak to all the space in the station which we control and we still control certain portions of the A level space. I'm not sure if there is any signage in that portion or not.

BY MS. PHARES:

Q. Okay. If you look at Exhibit A to Plaintiff's 2, there is a listing of stations where advertising is installed, but I see no specification as to portions of the stations.

A. I don't see anything in that exhibit either other than the listing of Penn Station itself.

Q. Okay. You indicated that Amtrak retains control of portions of the A level. Are they public areas of the A level?

A. Yes, some are.

Q. Can you describe generally what kind of public areas remain in the Amtrak control?

A. Yes. There are a certain corridors which are for the movement of passengers from the trains out of the station or vice versa, and I think that's the public space in the A level that we control, it would be that.

Q. Is there any nonpublic space in the A level that you control?

A. We have certain Amtrak work space, different employees of Amtrak have offices there or work station of some sort or another.

Q. But none of that space has any interface then with the operation of the Long Island Railroad?

A. It may be adjacent to it or something like that, and I guess it's conceivable, I don't know, that some of their people and our people do things together in some sort of way which is perhaps unofficial, but helpful. I don't know.

Q. Now, it is also true that New Jersey trains come into Penn Station; is that correct?

A. That is correct.

Q. At what level do they come in?

A. Well, the trains come in on the track level like all the other trains. Their passengers will walk through the A level as much as any other passenger will, and they will also walk through the B level, as much as any other passenger will. Their ticket counters are located on the B level.

Q. That's the level that Amtrak controls?

A. Correct.

Q. What operates the New Jersey trains?

A. New Jersey Transit.

Q. Is that a public authority?

MR. KOHANE: Objection.

MR. SLATTERY: Objection.

THE WITNESS: I assume it is.

BY MS. PHARES:

Q. Are there ticket booths on the B level operated by lease from Amtrak?

A. I'm not sure if it is a lease or a license arrangement or what it is, but they have authority from us to operate the ticket counters.

MS. PHARES: I'm going to request production of those lease agreements.

THE WITNESS: I'm not sure it is a lease agreement.

MS. PHARES: Whatever kind of agreement or contract that provides for the ticket—

THE WITNESS: It maybe an operating agreement. I don't know what it is.

MR. SLATTERY: The request is noted.

MS. PHARES: Let me put it this way: A contract that provides for the use of space on the B level by New Jersey Transit Authority.

MR. SLATTERY: Your request is noted and we will respond to it reserving all rights to object.

BY MS. PHARES:

Q. Does Amtrak receive income from those—for the moment, Mr. DeAngelo, I'm going to call them leases but I'm not suggesting that's what they are.

A. Okay.

Q. Does Amtrak receive income from those leases?

A. Yes.

Q. Do you know what the annual income is on those leases?

A. No, I don't.

Q. Do you have any idea?

A. No.

Q. Do you know whether or not there are any joint arrangements among Amtrak and the other transportation operating authorities, and by that I'm referring to the Long Island Railroad/MTA or the subway system or the New Jersey Transit for things such as maintenance of Pennsylvania Station, baggage handling or any other services?

A. Joint arrangements is the question?

Q. Yes.

A. The lease with the Long Island Railroad which is a thick document which I don't recall the specifics of deals with how they control their space, how we control our space and where there is interface between. For example, security. Does the cop stop here or can they cross that line? And other types of issues like that, so there are such that lease that speaks to

it in the case of Long Island. I'm aware of that because I executed that lease.

I'm not aware of others, but there may be.

* * *

[202:14 - 203:23] Q. Mr. DeAngelo, I believe you testified earlier about the ownership of Amtrak stock; is that correct?

A. I did.

Q. Do you know whether Amtrak has preferred stock?

A. Yes. In this annual report I just read indicates that it does.

MS. PHARES: Objection. The document speaks for itself.

BY MR. SLATTERY:

Q. Let me remind you, you can just answer the questions that I ask you.

A. Oh, okay.

Q. And Mr. DeAngelo, do you know who the owner of that preferred stock is?

A. Yes, the federal government.

Q. Okay. And Mr. DeAngelo, prior to reviewing this portion of the annual report that I've just shown you, did you know whether or not Amtrak also had common stock?

A. No.

Q. Let me note for the record, and counsel can let me know if she objects, the last paragraph that I had you read contains a reference to common stock. Do you see where that is?

A. I do.

Q. Do you have any reason to doubt that Amtrak does, in fact, have common stock?

A. No.

Q. Do you know who owns that common stock?

A. No.

* * *

[215:22 - 216:7] MR. SLATTERY: Let me just state on the record for purposes of clarification that we were asked at some point in the course of this proceeding to produce all tax

assessments on Penn Station and that we have produced these documents because they are tax assessments on Penn Station and that they were the only ones in Amtrak's files.

MR. COLE: From 1992-93?

MR. SLATTERY: From any time.

* * *

[220:12 - 227:7] Q. I want to show you what has been previously marked as Plaintiff's Exhibit 36, an April 3, 1991 letter from Vincent Notaro to Bruce Bourque.

Have you seen this letter before?

A. I don't recall seeing it.

Q. The notations on the bottom that say agency fee equals 15 percent and then AMTK 65 percent of net, do you know whose handwriting that is?

A. No, I don't. It's not mine.

Q. And how about the circle and the okay on the third full paragraph of the letter?

A. That's not my writing. I don't know whose it is.

Q. And when it says at the bottom of the letter "Received April 8, 1991 Real Estate Development," is that your office or no?

A. That's a section of the real estate department. It's the section where Mr. Bourque works.

Q. Do you know what the purpose of this letter is?

MR. SLATTERY: Objection. It calls for speculation.

MR. SPIRO: I join in the objection.

THE WITNESS: Do I answer?

MR. SLATTERY: Yes, you do answer the question unless I tell you not to.

THE WITNESS: By reading it, it seems that Mr. Notaro is asking Mr. Bourque's approval of continuing the rent payment the same as it had been the prior year.

BY MR. COLE:

Q. And does Mr. Bourque have the authority to approve such terms, financial terms regarding the Spectacular?

A. No. He would come to me.

Q. So if the okay is an Amtrak notation, then that would have been approved by you or it wouldn't have been legitimate?

MR. SLATTERY: Objection.

BY MR. COLE:

Q. Is that correct?

A. I believe that to be correct, yes.

Q. But you don't remember approving this?

A. No, I do not.

Q. From your experience in dealing with the Spectacular, is this the common way in which terms for Spectacular contracts were approved by Amtrak?

MR. SLATTERY: Objection. Ambiguous.

MR. SPIRO: I join in the objection. It's also calling for speculation on the part of the witness.

MR. COLE: I'm asking the witness whether—

MR. SLATTERY: I'll join in that also.

MR. COLE: I'm asking the witness whether in your experience the transmission of letters from TDI to Amtrak stating what the terms of Spectacular contracts would be, was that the common practice for approving of the terms—for Amtrak's approval of the terms of such contracts.

MR. SLATTERY: Objection. Speculation. No foundation.

You can answer.

THE WITNESS: I'm not sure that the letter itself represents common practices or not. But there would be communications, letter or otherwise, between Mr. Bourque and someone from TDI. And to the extent that that would come to me and through channels and get my approval.

BY MR. COLE:

Q. And in what circumstances would such communications require approval from you? What did you have to approve?

A. Such things as the amount of money that would be paid for—like this letter requested, that sort of thing.

Q. And the length of time for which the contract was—

A. Yes.

Q. That would have to be approved by you as well?

A. Well, that would depend. If it was going to be extending something for a day or a week or something, they wouldn't have to come to me, but if it was significant, they would.

Q. And significant means more than a day or a week?

A. Well, it's not that well-defined, but each individual case would be looked at and they'd make a judgment as to whether or not it was significant enough to be brought to my attention.

Q. I'm going to show you what has previously been marked as Plaintiff's Exhibit 35. I think you're familiar with this. This is a one-page letter dated April 27, 1988 to Mr. Bourque and it's copied sideways so that it's not possible to see the bottom of the letter.

Are you familiar with this letter?

A. No.

Q. You don't—

A. Well, I mean, I may have seen it, but I don't remember. Whose signature is on this?

MR. SPIRO: I believe during Mr. Notaro's deposition he identified it as his signature.

THE WITNESS: Okay. I may well have seen it, but I don't recall specifically.

MR. SLATTERY: Let me also just note for the record that there's an indication in the text of the letter that there's a space below for a countersignature and that that is missing in this copy and that this is the only copy that Amtrak has.

MR. COLE: Is this the only copy that TDI has as well?

MR. SPIRO: TDI has looked through its files and has not found a copy of the letter.

BY MR. COLE:

Q. So you don't recall—would you have been the person in April 1988 if a letter—if this letter came to Mr. Bourque setting forth terms and asking for a countersignature, would you have been the person who would have countersigned?

MR. SLATTERY: Objection to the extent that it assumes that the letter was countersigned or the terms agreed to.

You can answer the question.

THE WITNESS: Yes.

BY MR. COLE:

Q. And the purpose of this letter would be the same as the purpose of the letter I just showed to you?

MR. SLATTERY: Objection. Speculation.

You can answer.

MR. SPIRO: I join in the objection.

THE WITNESS: No, not exactly. I see this as being more general than that last one as I recall.

Yes, this letter is more general than this letter.

BY MR. COLE:

Q. In what sense do you mean more general?

MR. SLATTERY: Same objections.

You can answer.

THE WITNESS: This letter spoke to a specific user, A&S. This letter based upon my quick reading does not refer specifically to A&S.

* * *

[227:9 - 227:14] Q. I'm going to refer you to Plaintiff's Exhibit 2 previously marked.

MR. SPIRO: Is that the 1991 agreement?

MR. COLE: This is the 1991 station advertising agreement between Amtrak and TDI.

* * *

[237:4 - 239:13] Q. Isn't it true that the rates for the Spectacular are set on a per-contract basis as approved by Amtrak?

MR. SLATTERY: Objection. No foundation and assumes facts not in evidence.

MR. SPIRO: I also am going to object on the grounds of vagueness.

BY MR. COLE:

Q. Do you know how the rates are set for the Spectacular?

A. I believe that it's 65 percent of the net revenue.

Q. And how is that set?

A. How is what set?

Q. How is that 65 percent reached, figure reached?

A. As opposed to some other number other than 65? That was a negotiation some time ago.

Q. And has that been the consistent figure that has been used since you've had authority over—

MR. SLATTERY: Objection. No foundation.

BY MR. COLE:

Q. How long have you had authority over contracts regarding the Spectacular?

MR. SLATTERY: Asked and answered at the first deposition.

You can answer the question.

THE WITNESS: Since March 1, 1982.

BY MR. COLE:

Q. And since March 1, 1982, has the agreement been that Amtrak would receive 65 percent of the net revenues that TDI received for Spectacular contracts?

MR. SLATTERY: Objection. No foundation.

You can answer it.

THE WITNESS: I'm not certain. It may have been. It may have been in that general range, but I'm not certain.

MR. SPIRO: I'm going to move to strike to the extent the witness is speculating.

MR. SLATTERY: I'll join in that objection and repeat the foundation objection.

BY MR. COLE:

Q. Now, how are the absolute terms, the absolute financial terms for the leasing of the Spectacular determined? Does Amtrak have to approve—I'm not talking about the percentage now; I'm talking about the amount, say $10,000 a month or $15,000 a month. Does Amtrak have to approve those rates?

MR. SLATTERY: Objection. Ambiguous.

You can answer the question.

THE WITNESS: Yes.

* * *

[240:2 - 247:22] MR. SLATTERY: I think it was asked and answered, but since it's been asked a little more clearly this time, I'll let him answer subject to an objection for foundation. I don't think we've established that this witness is the person who negotiates those terms.

You can answer the question.

THE WITNESS: Would you mind repeating the question. I've forgotten it.

BY MR. COLE:

Q. You stated that Amtrak has to approve of the amounts that are paid to place advertising in the Spectacular; correct?

A. Correct.

Q. And does Amtrak approve those amounts each time TDI makes a contract with an advertiser to display advertising in the Spectacular?

A. Yes.

Q. I'm going to show you what has previously been marked as Plaintiff's Exhibit 37.

Are you familiar with this document?

A. I'm familiar with many similar such documents. I'm not certain about this one.

Q. What is the purpose of this document, if you know?

A. I know the purpose of such similar documents. The reason I'm hesitating is I don't see my signature on this particular one, so I'm not certain as to that.

Q. Right.

A. But generally speaking, such documents are prepared to get approval at the appropriate level of the corporation for a particular transaction.

Q. So who would this form be prepared for generally?

MR. SLATTERY: Objection. Ambiguous.

You can answer the question.

THE WITNESS: It depends on the level within the delegation of authority process. If it was a certain level, it would be prepared for my—I'd be the final signator. If it was

another level, it would go to the executive vice president. Another level would go to the president. Another level goes to the board of directors.

BY MR. COLE:

Q. And the levels that you're referring to, are those monetary amounts?

A. Yes.

Q. And do you recall whether the subject matter of this document was approved by yourself or by the vice president or by the president or by the board?

A. No. I'd have to check. I do not recall.

MR. COLE: All right. I'll mark as Plaintiff's Exhibit 58 a set of minutes dated September 22, 1987 of a meeting of the board of directors real estate subcommittee.

(SET OF MINUTES DATED 9-22-87 MARKED PLAINTIFF'S EXHIBIT-NUMBER 58 FOR-IDENT.)

BY MR. COLE:

Q. Have you seen this document before?

A. Yes.

Q. Does this refresh your recollection of who approved of the A&S Spectacular sign agreement that is referred to in Plaintiff's Exhibit 37, the justification?

MR. SLATTERY: Just to clarify, when you ask whether he's seen it, I don't know whether you're including in it if it was shown to him by counsel in preparation for his deposition.

THE WITNESS: Yes.

BY MR. COLE:

Q. What is your recollection now?

A. Well, not my recollection, but what the process or procedures would call for, as opposed to a recollection, is that such a justification would have been prepared and signed by others than the one signature on this copy that you gave me and then included with material presented to this real estate subcommittee.

Q. And it's presented to the subcommittee for what purpose?

A. Approval.

MR. COLE: And then I'll mark as Plaintiff's Exhibit 59 a set of minutes from the same date from the finance committee.

(SET OF MINUTES MARKED PLAINTIFF'S EXHIBIT-NUMBER 59 FOR-IDENT.)

BY MR. COLE:

Q. Is the process that both the finance committee and the real estate subcommittee have to approve of leases of property by Amtrak?

MR. SLATTERY: Objection. Ambiguous.

BY MR. COLE:

Q. Let me clarify. This document indicates that the finance committee considered a resolution authorizing the lease of the advertising Spectacular sign location in Penn Station to A&S Department Stores, Inc. It's dated the same date as the prior document that I showed you, the real estate subcommittee minutes which contains the resolution itself entitled A&S Department Stores, Inc.

I'm just trying to understand, is it the practice that both the finance committee and the real estate subcommittee have to approve a lease such as this for the Spectacular before it can be entered into?

MR. SLATTERY: You're asking him if that's Amtrak's current practice or—

BY MR. COLE:

Q. Well, let's ask, was that the practice at this time in 1987?

A. The real estate subcommittee was a subcommittee of the finance committee. Therefore, as a matter of routine, the subcommittee would report to the full committee on everything, including this.

Q. So the real estate subcommittee has to approve it or recommend approval; is that correct?

A. Correct.

Q. Then the finance committee would approve or not approve; is that correct?

MR. SLATTERY: Let me just object that it mischaracterizes the witness' testimony.

MR. COLE: I'm just trying to understand. If it's a mischaracterization, the witness can tell me I'm mischaracterizing. I'm simply trying to get it clear.

MR. SLATTERY: Fine.

BY MR. COLE:

Q. First we have the real estate subcommittee makes a recommendation, then the finance committee considers that and makes its recommendation?

A. Correct.

MR. SLATTERY: Let me just state for purposes of clarity, when Mr. DeAngelo testified, he spoke in the past tense and you're talking in the present tense. He said it was the practice and you're saying it is the practice.

BY MR. COLE:

Q. Has the practice changed?

A. Yes.

Q. How has the practice changed?

A. There's no longer a real estate subcommittee.

Q. So is there still a finance committee?

A. Yes.

Q. So does the finance committee—is the practice now that the finance committee recommends and the board approves?

A. Correct.

Q. And at this point the procedure was that the real estate subcommittee approved, the finance committee approved and then the board approved?

A. That's right.

MR. COLE: I want to mark as Plaintiff's Exhibit 60—let's go off the record a second.

(Discussion off the record.)

(BOARD APPROVAL OF RESOLUTION MARKED PLAINTIFF'S EXHIBIT-NUMBER 60 FOR-IDENT.)

BY MR. COLE:

Q. Have you had a chance to review Plaintiff's Exhibit 60?

A. Yes.

Q. And does this reflect the board approving the resolution which was previously approved by the finance committee and the real estate subcommittee?

MR. SLATTERY: Objection. No foundation.

BY MR. COLE:

Q. You can answer.

MR. SLATTERY: I'm sorry. You can answer the question.

THE WITNESS: Yes.

* * *

[262:24 - 264:6] Q. Have you ever instructed anybody at TDI that they should not display public service advertising?

MR. SLATTERY: I just want to review the transcript.

(Pause in the proceedings.)

I'll permit the witness to answer this question for the purpose of laying a foundation for what I hope will be a new line of questioning.

THE WITNESS: Over the years, we have instructed TDI a number of times to maximize revenue to Amtrak, which means among other things making sure there's no space that is unsold. And we pushed that issue continuously.

I do not know of any time we've told them not to do public service advertising, but many times we've told them to do paid advertising.

BY MR. COLE:

Q. So is the basis for your objection to noncommercial advertising that it doesn't create revenue for Amtrak?

MR. SLATTERY: Objection. Mischaracterizes the witness' testimony.

MR. COLE: I'm not characterizing any testimony. I'm just asking a question.

BY MR. COLE:

Q. Is that the basis for your objection to noncommercial advertising?

A. It's certainly a basis.

* * *

[294:3 - 297:20] Q. And when you characterize it, a noncommercial advertiser, an advertiser who is not selling a product is paying full rates, how does that implicate Amtrak's concerns?

A. Well, that goes to the question of a concern. The "a concern" spoke to the issue we're always trying to maximize revenue. So that's a concern. But then there are other concerns that go beyond just making money that we have been discussing. The competitive thing, for example.

Q. Well, the competitive thing is about making money, isn't it?

MR. SLATTERY: Objection. Ambiguous and mischaracterizes the witness' testimony.

BY MR. COLE:

Q. Well, go ahead.

A. As I understood where we're going with this, there are two types of money issues here. One is the money you get for that particular advertisement being displayed. That's an X number of dollars. You get that.

The other type of money would be the potential impact that that advertisement may have in the case of the competitive thing on your overall revenue from selling tickets on trains, but not from that particular advertisement being placed there.

So that's the distinction where I think maybe I'm getting confused at least.

Now, the question?

Q. And the question is: What is the concern with an advertisement that does not promote a product or policy but is willing to pay full rate? Where does Amtrak's concern come from?

MR. SLATTERY: Objection. Asked and answered repeatedly at the last deposition and at this deposition as well. I'll let the witness answer this question in the hope that this is going to lead to a legitimate line of inquiry but subject to my objection.

You can answer it.

THE WITNESS: That goes to the same issue here. Put out part A which is the money being offered for the advertisement itself. That's not the issue. It goes to not promoting a product or service. It goes to that issue.

So if it's an advertisement that is noncommercial, i.e., does not promote a product or a service, then we would reject it, even though they offered to pay the rate, the going rate for it.

BY MR. COLE:

Q. And I guess I'm just trying to get as to is there a revenue concern in that context or is there a broader—you talked about the broader revenue concern.

Is there a broader revenue concern that leads you to object to noncommercial advertisements even when they're willing to pay?

A. That would depend I think on the particular advertisement.

Q. Was there a revenue concern with respect to the impact of Mr. Lebron's advertisement on Amtrak's revenues from passengers or competitors or anything like that?

A. Not directly.

Q. Indirectly?

MR. SLATTERY: If I can, are you asking him in the decision to reject the advertisement? I think the previous question is ambiguous.

MR. COLE: Yes.

THE WITNESS: Well, to the extent that there would be any concern on the part of anyone, meaning in this case the riding public, our potential passengers, that anything that they would negatively view Amtrak as a result of anything that happens in the station we try to avoid.

For example, dirty bathrooms, you try to avoid that because that would negatively impact a person's desire to ride trains.

The environment in the station you would try to avoid, so that would include such things as the type of advertising you would have in a station.

So would you try to avoid anything that would have that effect.

* * *

[314:7 - 316:13] Q. And does that mean that decisions that you make with respect to advertising policy must be in some way related to revenue concerns of the corporation?

MR. SLATTERY: Objection. Ambiguous. And also just so the record is clear, I'm restating—I restate my objection to this entire line of questioning, but I'm permitting the witness to answer it.

THE WITNESS: One of the major goals of the corporation is to maximize revenue. One of the major goals of my department is to maximize revenue. So we try to do things consistent with both of those goals.

BY MR. COLE:

Q. And do you consider the policy that you've explained about advertising standards for Amtrak, do you consider that policy to be designed to maximize the revenues of Amtrak?

MR. SLATTERY: Objection. Ambiguous.

You can answer the question.

THE WITNESS: Yes.

BY MR. COLE:

Q. Just to make it clear, do you consider the policy with respect to the contents standards that you apply to advertising to be related to the goal of maximizing revenues?

A. If the inference is that will we always maximize dollars, revenue dollars to the exclusion of any other consideration, the answer is no. We always try to maximize revenue, yes, but not to the exclusion of any other consideration.

Q. What other considerations do you take into account?

A. Well, the ones we discussed, you know, lots, competitive for example, commercial nature for example, pornography for example, those types of things.

Q. Now I'm not exactly clear. I thought you stated earlier that a revenue concern was that if you display an advertisement that is offensive to passengers, then they will associate that with Amtrak, they will not ride Amtrak, and that will have a revenue effect.

A. I did say something like that, yes.

Q. So in that sense, the content advertising policies are realted to revenue concerns?

MR. SLATTERY: Objection. Ambiguous.

You can answer.

THE WITNESS: In that indirect sense, yes.

* * *

[317:4 - 317:18] Q. Mr. DeAngelo, I've just handed you a document that has previously been shown to you at your deposition and that is marked as Plaintiff's Exhibit 36.

So that the record is clear on this, I'd just like to ask you, having looked at this document which I recall you were not able to identify—and correct me if I'm wrong about that—do you recall whether Mr. Bourque sought your approval for the terms described in this document, the financial terms and the renewal of the A&S contract?

A. No, I do not recall, but I imagine he did because our procedures would call for that.

EXCERPTS OF DEPOSITION TESTIMONY OF MICHAEL J. GALLAGHER

Deposition of Michael J. Gallagher, held at the offices of Siff Rosen, 233 Broadway, New York, New York 10279, commencing at 10:00 A.M., Wednesday, January 13, 1993, before Tammey M. Pastor, RPR.

* * *

[6:2 - 7:5] Q. Mr. Gallagher, would you please state your name and address for the record.

A. Michael J. Gallagher. I reside at 101 30th Street in Copauge, Long Island, New York.

Q. Could you briefly describe your educational background for me?

A. I attended St. John's Baptist High School and graduated in '74. After that I attended one year at Suffolk Community College. I majored in criminal justice. After one year I began employment with Amtrak in September of '75.

Q. Can you briefly describe your employment history with Amtrak from 1975 to date?

A. I was hired as a baggage man in September of '75 working out of Penn Station. I worked in the mail, baggage room, express department. Two years later I was promoted to supervisor of mail, baggage and express.

From there I was promoted to the general supervisor of mail, baggage and express.

In April of '90 I was promoted to the manager of stations, New York.

Q. Your current title is manager of station, New York?

A. Manager stations, passenger services, New York.

* * *

[8:2 - 10:3] Q. Can you describe your duties as manager of station services?

A. Basically I am responsible for the ticketing operation in Penn Station, the mail, baggage and express operation and the

station services operation. Those, the employees that are responsible for each department's operation report directly to me.

I am also responsible for passenger movement and any dealings with other railroads regarding passenger movement, passenger handling, train movement through Penn Station.

Q. Can you describe in a little more detail what your responsibilities are with respect to the ticketing aspect of your job?

A. The general supervisor of ticketing reports directly in to me. All right? The ticket operation in New York, in other words I am overall responsible for its operation and proper function.

Q. What is that operation, sir?

A. Basically to collect—the collecting of revenues, appropriate revenues, the issuance of tickets, the security of revenues collected. Everything involving the transaction regarding a ticket sale.

Q. Can you tell me what the mail bag and express operations encompass?

A. Again, the general supervisor of that department reports in to me. Basically responsible for all mail handling, U.S. mail handling through a contract with the U.S. Post Office and Amtrak, all checked baggage, temporary baggage that is handled by Amtrak, and all express or it's commonly known as freight that is handled and transported on our cars.

Q. Can you describe for me what is meant by the station services operations that you described?

A. Basically station services is the direct interaction and assistance of all passengers, whether it is the proper boarding of trains, proper assignment on trains, the assisting and ADA requirement.

Q. Excuse me, can you tell me what ADA requirements are?

A. American Disabilities Act. Basically overall passenger assistance.

Q. How does the Americans with Disabilities Act affect Amtrak?

* * *

[11:2 - 12:9] THE WITNESS: Well, I have to ensure or make sure that passengers can gain access to the station appropriate for those that might be confined to a wheelchair.

BY MS. SILVERMAN:

Q. You also mentioned you were responsible for passenger movement?

A. Yes.

Q. Is that different from the station services aspect of your job which you just testified about?

A. No. Basically it is the same.

Q. I believe finally you mentioned you were responsible for dealings with other railroads. Can you explain to me what you do in that capacity?

A. Within Penn Station is two other railroads that are tenants in the station. My dealing with them would be just for the daily business contact, whether it be equipment problems, group moves, or whether it came down to conditions of platforms which we share. It might regard trash removal, cleaning specifications.

BY MS. SILVERMAN:

Q. Who are these two other railroads that you say are tenants in Penn Station?

A. New Jersey Transit and Long Island Railroad.

Q. I believe you said they were tenants in Penn Station. Do you know whose tenants they are?

A. Amtrak's.

* * *

[13:4 - 13:8] Q. Do you have any interface with anyone from the MTA concerning Penn Station?

A. From time to time.

Q. What kind of communications or dealings do you have with people from the MTA?

* * *

[13:14 - 14:22] MR. LANDMAN: Do you actually have dealings with MTA separate from Long Island Railroad?

THE WITNESS: Metropolitan Transit. Yes, subway, is that what you are referring to?

MR. LANDMAN: I don't know if the witness is being asked about the Transit Authority or MTA which is the body that oversees the Long Island Railroad, Metro-North, as well as the TA. Why don't you answer who you have dealings with.

THE WITNESS: From time to time, all.

BY MS. SILVERMAN:

Q. Why don't we take them one at a time. If you could just tell me what type of dealings you have?

MR. LANDMAN: When you said "all" I had mentioned Metro-North. Had you ever had any dealings with Metro-North?

THE WITNESS: Yes.

BY MS. SILVERMAN:

Q. Why don't we take them one at a time. If you could describe for me what kind of dealings you have with people from Metro-North?

A. Presently my only involvement with Metro-North would be regarding the ticket operation, which I should have mentioned before I am responsible for. The Amtrak ticket operation is in Grand Central.

Q. What kind of ticketing operation for Amtrak is at Grand Central?

* * *

[15:5 - 26:5] THE WITNESS: I guess it was approximately 2 years ago, to start off. Amtrak had its Empire Service operating out of Grand Central. I was responsible for the passenger service portion of that operation for Amtrak at Grand Central which involved any passengers purchasing tickets and utilizing the trains out of Grand.

Some time ago this operation had been moved over, the train operation has been relocated over to Penn Station. With that transition we kept a satellite office in Grand Central, which basically just consists of two ticket sellers working a five-day week selling Amtrak tickets.

I am responsible for that operation over there, and the employees of that operation were brought into my office.

The dealings I would have with Metro-North was prior to us being there as a tenant in Grand Central and still as a tenant in Grand Central.

BY MS. SILVERMAN:

Q. Forgive me if you answered this, but when did the Empire Service begin out of Grand Central, if you know?

MR. LANDMAN: No, when did it begin out of Penn Station.

MS. SILVERMAN: No, out of Grand Central.

THE WITNESS: When did Grand Central come to Penn?

BY MS. SILVERMAN:

Q. No. When did Amtrak start offering an Empire Service that was at Grand Central and going wherever, if you know?

A. Since I have been working with the company it was over there.

Q. You have been employed since 1975?

A. Yes.

Q. Can you just briefly tell me what the Empire Service is?

A. Upstate points.

Q. Can you tell me what your contacts have been with employees from MTA concerning subway service?

A. Basic contact or conversations I have had with them are, number one, regarding the 7th Avenue access to the station. Basically crowd control conditions.

We had redeveloping that went on throughout the station, just had dealings with them on passenger egress to the station. Basically that was it.

The only other contact I do have with them is regarding their information services which are in Penn Station and located in Amtrak's information booth.

Q. Do MTA employees staff Amtrak information booths with respect to MTA information?

A. We are assigned to New York City Transit is staffed by an MTA employee, yes.

Q. Have they leased this window or this space from Amktrak?

A. No.

Q. Do they provide you with any monetary consideration for their use of the window?

A. No.

Q. Did you negotiate with the New York City Transit Authority to permit them to have an employee at one of the Amtrak windows?

A. Yes.

Q. When did that occur?

A. That has been at least two years ago

BY MS. SILVERMAN:

Q. You mentioned that you have dealt with New York City Transit concerning crowd control conditions?

A. Yes.

Q. Can you describe what that is about?

A. I will try to give you one example that hopefully will describe it. When we had the Democratic National Convention, a lot of exits were restricted during certain hours.

There was a lot of informational signage that was placed around, you know, the perimeter of Penn Station advising subway riders, if you will, to utilize certain entrances which

might have been Amtrak's, designated as an Amtrak entrance during these times.

Q. Can you describe your dealings with New York City Transit concerning the 7th Avenue access to the station?

A. The area I was referring to is the access that comes into the Hilton corridor which is basically the dividing line between Amtrak and Long Island Railroad property, if you will.

The corridor is Amtrak's responsibility as far as maintenance, whether it is cleaning or repair, structural repairs. When I referred to that earlier, I was regarding repairs that were needed down by that area where their token booth is.

Q. Can you describe for me the dealings you have had with LIRR employees concerning Penn Station?

A. Well, there has been several dealings regarding several issues ranging from station redevelopment versus basically boundary lines as they relate to janitorial services.

Q. What kind of dealings have the ones concerning station redevelopment been?

A. Basically when Amtrak, we were going through certain redevelopment, probably more so now on Long Island going through their capital program. I just had dealings with my counterparts and I was responsible for their end of the Long Island terminal regarding closing down of certain stairways, closing of escalators, crowd control conditions.

Q. Are there any areas of Penn Station that Amtrak and LIRR are jointly responsible for the maintenance, upkeep or cleaning of?

MR. LANDMAN: Just note my objection. I think that is spelled out in the lease agreement.

A. We are responsible for our own, as outlined.

Q. There is no overlap between LIRR and Amtrak?

MR. LANDMAN: Same objection.

THE WITNESS: I really don't understand what you are asking. Are you asking if it is—we both clean one particular area?

BY MS. SILVERMAN:

Q. Yes.

A. And just alternate on it?

Q. Either just alternate on it or one compensates the other for cleaning—

A. No.

Q. —services?

A. No.

Q. Do you have that type of relationship with New York City Transit concerning any of the subway stairways or corridors that lead to the subway areas?

A. No.

Q. Is New York City Transit responsible for the upkeep of the areas leading to and from the Amtrak areas of Penn Station?

MR. KOHANE: Objection to the form of the question.

MR. LANDMAN: Same objection.

Do you understand the question?

BY MS. SILVERMAN:

Q. If you know.

A. I am not quite sure we are talking about areas that they would come from, for example, Amtrak areas into theirs?

Q. Yes.

A. We are responsible for our own cleaning of our own areas, which might lead into their responsibility of area.

Q. At some point New York City Transit becomes responsible for the upkeep and maintenance of certain areas of Penn Station?

MR. LANDMAN: Objection. I don't think that is what he said.

THE WITNESS: No. What I am saying is, I will use an example of the Hilton corridor again, which is under my janitorial contract for cleaning, okay, to a certain location where it becomes Transit's property.

BY MS. SILVERMAN:

Q. With respect to New York City Transit, do you know how the determination was made between what was going to be considered their responsibility as opposed to Amtrak's responsibility?

MR. LANDMAN: Objection, no foundation, I don't think. I don't think he testified he was involved in that at all. You can ask him if he knows.

THE WITNESS: No.

BY MS. SILVERMAN:

Q. Had it been that way from the time you began your employment with Amtrak, that you were aware?

MR. LANDMAN: Objection. I think he started in the baggage department. I am not sure he would have been aware.

THE WITNESS: All I can say is that when I took over this position, okay, on the date as I mentioned before, they were in existence.

BY MS. SILVERMAN:

Q. I believe you said you took over the position in 1990?

A. April, yes.

Q. Who was your predecessor?

A. My predecessor was Joseph Dealy.

Q. Have you had any communications with anyone from New Jersey Transit concerning the running of Penn Station, maintenance of Penn Station or any other aspect of Penn Station?

A. Yes.

Q. Can you explain what kind of communications you have had?

A. Basically, as I said before, New Jersey Transit is a tenant in Penn Station.

We jointly share platforms with them. They have certain platforms that basically are assigned to them within the station for their equipment. Conversations I might have with

them would be regarding proper removal of trash from the platforms, passenger elevator discussions for handicapped, setting up procedures to assist them with the handling of any handicapped passengers that might be traveling on their trains.

Just general discussions of any event, programs that might be going on.

Q. Earlier I believe you mentioned that with respect to New York City Transit during the Democratic Convention there were certain access stairways to transit level that were closed.

Had you had any conversations with any of the other tenants in Penn Station concerning the Democratic National Convention and what that would mean for service?

A. Yes.

Q. Can you briefly describe the types of communications you had concerning the Democratic National Convention with these other entities?

MR. LANDMAN: Just note my objection as to relevance.

THE WITNESS: Prior to the official start off, if you will, of the convention in Madison Square Garden, it was approximately a year before that, I was designated as the Amtrak contact, okay, with the City of New York and with the DNC.

During the course of meetings that were held by all types of agencies, I was asked for contact that could be made to certain representatives of other railroads within Penn Station, more so just as a point so everybody was on the same level and everybody was keyed into exactly what was going on and all.

On my own, being that I was the delegate of the station and I would have several meetings not only with Amtrak departments, but I also would invite the other agencies, too, so they know exactly what was going on as far as closing down, restriction of areas, certain events going on, times of day they were going on, and what our involvement was going to be with special train operations, et cetera.

Q. You mentioned other agencies. Can you tell me who they are?

A. Transit. New Jersey Transit. I spoke with Long Island Railroad. Then all departments which there is many within Amtrak.

* * *

[31:4 - 31:6] Q. Let me show you documents which have already been marked as Plaintiff's Exhibit 13 and Plaintiff's Exhibit 14.

* * *

[31:20 - 34:3] Q. Yes. It is my understanding this drawing, what this is, just for the record is, I guess it is a floor plan for Pennsylvania Station, different levels. It is my understanding it is a little old and may not be completely accurate as identified on the document.

Just also for your information, the blue penmarks that you find on Plaintiff's Exhibits 13 and perhaps 14 were made yesterday by Mr. Schwartz during his deposition.

A. Okay.

Q. Could you show me where the Amtrak ticket windows currently are located?

A. Back in here. Where the P's are.

Q. I will just note that this drawing being old had the ticket offices in a different location on the drawing. So I would ask you take this red pen and mark Plaintiff's Exhibit No. 13 to reflect where the "Amtrak ticket offices" currently are?

A. How?

Q. Just if you want to draw either a square, a rectangle or some kind of marking and then we can write "Amtrak ticket offices" near it so that we will know where they are located.

A. Basically, again, right in this area again, here.

Q. Can you just write "Amtrak ticket office" so we will know that is what the red triangular figure represents.

Thank you.

Mr. Gallagher, is it in one of these ticketing windows or ticket offices that the New York City Transit Authority has someone stationed?

A. No.

Q. Can you point to where the person from New York City Transit is located?

You don't have to draw it at this point.

A. This vicinity right in here. Right in here. General area right here.

Q. Are there any other ticket offices underneath there?

A. No.

Q. So there is just a New York City Transit person in that space?

A. No. Right in this location, as I indicated, is the Amtrak information booth and the Amtrak train announcer. In this booth also is a window provided for the Transit Authority employee.

Q. When someone is going to this booth, do they come this way to the booth?

A. They can.

* * *

[44:6 - 49:24] Q. When did you first become aware that a free speech policy existed for Penn Station?

A. Prior to me being appointed to this job I knew of a policy, whether there was a policy. I didn't really become actually involved and/or familiarized with it thoroughly until I took over the job, which was April of '90 or thereabouts.

Q. Did your predecessor at that time you were taking over the job inform you of the fact you would have responsibilities with respect to a free speech policy?

A. I am not quite sure.

Q. Do you recall around the time that you took this job whether you had discussions concerning your responsibilities with respect to a free speech policy with anyone?

A. Yes.

Q. Who was it?

A. I believe back then it was the person whom I reported into at that time whose name is Jim Ricker. I reported into him at that particular time. I believe that is where I got involved with, you know, this is the policy, it will be your responsibility to control.

There might have been others at that time that offhand I don't recall.

Q. Do you recall anything else in substance or effect about that conversation with Mr. Ricker?

A. One thing that comes to mind is my conversation—what happened back then was even though the passenger services department would receive the application, the actual administering, if you will, of the permit was done by the police department, Amtrak police in the station.

To be quite honest, I found that sometimes these permits were given out unauthorized. That is where I became probably more involved at that point with this due to just walking around the station and finding people with permits that I had no idea about. And through conversations I had with the police regarding the policy and all, at that time people in charge were more than willing to say if you would like to take it over, that is fine with us. That is basically what we do.

We are getting back to what I had mentioned earlier when I brought it to the station operation, that is where the permits are kept, secured. For those that are authorized whether daily or whether yearly, receive their permits from me with the police department knowing that it is authorized.

Q. How does the police department get informed that permits have been authorized?

MR. LANDMAN: Objection. I don't think they do. I don't think he testified that they do. Is the police department informed?

THE WITNES: Well, it is twofold. Either they have been verbally, you know, advised or the persons that were authorized have the permit in their possession.

BY MS. SILVERMAN:

Q. How did people get unauthorized permits when the police department was responsible for issuing them?

MR. LANDMAN: Objection as to foundation. If you can answer, go ahead.

THE WITNESS: The only thing I can say is they just were unaware of proper procedure. That is all I can say.

BY MS. SILVERMAN:

Q. Who was unaware of proper procedure?

A. Whoever it was that handed them out.

Q. How did you find this out?

A. By walking around the facility and seeing someone that had one that I had no idea about. That, as far as I was concerned, they were unauthorized.

Q. What do you mean by "unauthorized"?

A. Because they weren't approved from our department.

Q. Just so I understand this, are you saying that back then what was happening was that the police were providing permits to individuals without informing the station manager's office that they were doing so?

A. That did happen, yes.

MR. LANDMAN: Back then you are referring to prior to April of 1990?

MS. SILVERMAN: Or around that time.

THE WITNESS: When I first became involved I—that is, like I said earlier, maybe that made me more involved if you will, at that particular time.

BY MS. SILVERMAN:

Q. Was that right at the same time you took over your current position in April of 1990 or was it some time after that?

A. It was after that.

Q. Do you recall approximately when it was that you met with the police and ironed out the way the policy would work in the future?

A. Offhand I am really not sure.

Q. Was it some time during that first year?

A. Oh, yes, I would say yes. Yes.

Q. I believe you testified that you have had one or a few meetings with representatives of the Amtrak police force to try and iron out how the procedure would work in the future; is that correct?

MR. KOHANE: Objection to the question as to what he testified to.

THE WITNESS: I had discussions with the appropriate personnel of the police department regarding the permits. How many and how in depth, I don't recall.

BY MS. SILVERMAN:

Q. Do you recall whether there were any written communications between you and the appropriate people within the police department concerning this issue?

A. Not that I can recall, no.

Q. Do you recall the name of the individual from the police department who you worked out the current arrangement with?

A. Back then, yes, I do.

Q. What is that person's name?

A. I think, I believe her title now is Inspector Cathy Johns.

Q. Do you know how long the police had responsibility for issuing permits prior to your revising the policy?

A. No, I don't.

* * *

[50:25 - 51:6] MR. LANDMAN: Just for the record to make sure you and the witness are on the same topic, the police we have been talking about all along have been the Amtrak police, not the city police. You understand that.

THE WITNESS: That's correct.

* * *

[89:22 - 93:2] Q. Let me direct your attention to paragraph 4 of Plaintiff's Exhibit 30. Can you identify for me what the public areas of Penn Station are?

MR. LANDMAN: As referenced in this document?

MS. SILVERMAN: What his understanding of what this refers to.

THE WITNESS: As outlined in number four?

BY MS. SILVERMAN:

Q. Yes.

A. Public areas within the facility, within the station, would be seating areas, concourses, waiting areas.

Q. Does the issuance of a permit pursuant to these guidelines entitle a person or a group to exercise free speech rights in areas of the station that have been leased to the LIRR?

A. I have no dealings whatsoever regarding the areas that come under the responsibility of the LIRR.

Q. So the answer to my question is no?

A. That's correct. No.

Q. Do you know—

A. Well—repeat the question for me again.

MS. SILVERMAN: We will have the reporter read it back.

(The pending question was read.)

THE WITNESS: No. No.

BY MS. SILVERMAN:

Q. Are you aware of whether the Long Island Railroad has any free speech policy concerning the space that it has leased from Amtrak in Penn Station?

MR. KOHANE: Objection to relevance.

MR. LANDMAN: Objection, no foundation and relevance.

THE WITNESS: I am not sure.

BY MS. SILVERMAN:

Q. Has the LIRR ever complained to you about individuals or organizations exercising free speech rights in Penn Station?

MR. LANDMAN: Objection.

MR. KOHANE: Objection to relevance.

MR. LANDMAN: Objection.

THE WITNESS: Not that I can recall.

BY MS. SILVERMAN:

Q. Are there any areas in Penn Station that are shared access spaces between the LIRR and Amtrak?

MR. LANDMAN: Objection to the form of the question.

THE WITNESS: We jointly share platform usage in the station, track usage, and passengers detraining from Long Island Railroad do come through Amtrak's portion of the facility for access to the street.

BY MS. SILVERMAN:

Q. Does a permit granted pursuant to Amtrak's free speech policy entitle a person or individual to exercise free speech rights in areas of Penn Station that have been leased to New Jersey Transit?

MR. KOHANE: Objection.

MR. LANDMAN: Objection.

THE WITNESS: With regard to the station facility itself, the only areas that have been leased and are the responsibility of New Jersey Transit is the ticket windows.

Q. So again is the answer to my question no?

A. No. Right.

* * *

[126:8 - 127:6] Q. Have you been involved in any negotiations with New Jersey Transit concerning New Jersey Transit's use of Penn Station apart from what you have already testified to today?

MR. KOHANE: Same objection.

THE WITNESS: I have been involved with both Long Island and New Jersey Transit regarding service enhancement to the station, if you will.

Not necessarily sit down negotiations, but discussions on current leasing and agreement with Long Island and what future capital program work that New Jersey Transit is looking at for Penn Station and for their area of operation.

BY MS. SILVERMAN:

Q. How often have you had discussions with people from New Jersey Transit?

MR. KOHANE: Objection.

Q. Is this an ongoing situation?

A. Not regularly. I just had, you know, several meetings with them or meetings I have attended with them.

* * *

[128:7 - 128:10] Q. Do you know whether the Amtrak police have responsibility for those portions of Penn Station that have been leased to New Jersey Transit and the LIRR?

* * *

[128:24 - 129:20] THE WITNESS: Long Island Railroad, no. New Jersey Transit, Amtrak police will respond to their request for assistance within the station, yes.

BY MS. SILVERMAN:

Q. Is it your understanding the Amtrak police will not respond to requests for assistance by the LIRR?

MR. LANDMAN: Objection, speculation. Assumes the Long Island Railroad police would request Amtrak police assistance.

THE WITNESS: That is exactly it. Long Island has their own police force within the station.

BY MS. SILVERMAN:

Q. Does New Jersey Transit have their own police force within the station?

A. New Jersey Transit has their own police force but they do not have any of their officers assigned on a permanent basis to Penn Station.

EXCERPTS OF DEPOSITION TESTIMONY OF BRUCE M. BOURQUE

Deposition of Bruce M. Bourque, held at the offices of Siff Rosen, P.C., 233 Broadway, New York, New York 10279, commencing at 1:48 P.M., Thursday, January 14, 1993, before Tammey M. Pastor, Rpr.

* * *

[5:6 - 6:24] Would you please state your name and address for the record.

A. My name is Bruce Bourque. 60 Massachusetts Avenue, Northeast, Washington, D.C. 20002.

BY MS. PHARES:

Q. That is your business address?
A. Yes.
Q. What is your home address?
A. 10006 Fleming Avenue, Bethesda, Maryland 20814.
Q. How old are you?
MR. SLATTERY: Objection on relevance grounds.
You can answer the question.
THE WITNESS: I was born in 1951. 41.

BY MS. PHARES:

Q. Would you describe your education after high school, please.

A. University of Connecticut BA. MBA Western New England College.

Q. What is your BA in?
A. Sociology.
Q. What position do you hold now?
A. Project director real estate development, Penn Station, New York.
Q. For how long have you held that position?
A. Four years.
Q. What position did you hold before that?

A. Project manager, Penn Station real estate.

Q. I beg your pardon, did you say four years in that position as well?

A. Yes. Well, I started in 1984.

Q. When you say "started," you mean you began in Amtrak in 1984?

A. Yes.

Q. When you began at Amtrak, was that as project manager real estate Penn Station?

A. Yes.

* * *

[7:16 - 7:20] Q. In your present position as project director, to whom do you report?

A. Don Pross.
Q. He in turn reports to Mr. DeAngelo?
A. Yes.

* * *

[12:13 - 13:14] Q. What responsibilities do you have at Penn Station?

A. I negotiate leases with prospective tenants, licensees. I work with the other railroads and Amtrak's neighbors on real estate matters. Work with property management type functions.

Q. What do you mean by "property management"?

A. Coordination with respect to cleaning and security and maintenance. Construction type coordination. From a real estate perspective.

Q. You mentioned that you negotiate leases with prospective tenants and licensees.

Do you sign those leases and licenses?

A. Signature?
Q. Yes.
A. No.
Q. Who does?
A. Tony DeAngelo.

Q. You make recommendations about the contracts and then Mr. DeAngelo decides whether they will be signed?

A. Yes.

* * *

[34:16 - 40:16] Q. Plaintiff's Exhibit 34, do you recall receiving this letter?

A. I don't absolutely recall it. I wouldn't say that I didn't receive it.

Q. There is a reference at the beginning of the letter to a conversation.

Do you recall discussing payment terms with Mr. Notaro?

MR. SLATTERY: At that time of this letter?

MS. PHARES: At that time of this letter.

MR. SLATTERY: Okay.

THE WITNESS: I don't recall a particular conversation.

BY MS. PHARES:

Q. Is it part of your responsibility to negotiate the payment terms for payments from TDI to Amtrak for The Spectacular?

A. No.

Q. Whose responsibility is it?

A. To the best of my knowledge, the rate has not been negotiated.

MR. KOHANE: Can we go off the record.

MS. PHARES: Yes.

Off the record.

(Discussion off the record.)

BY MS. PHARES:

Q. What do you mean the rate has not been negotiated?

A. To the best of my knowledge, the rate has been 65 percent—

MR. SLATTERY: Can we mutually agree to strike that answer?

MR. KOHANE: I guess we will redact it.

THE WITNESS: Is the question did I negotiate this rate or against a different rate or any rate? The answer is no.

BY MS. PHARES:

Q. As far as you know, is the rate set some place else?

A. Yes.

Q. Where?

A. The rate was set in letters like this. The rate was set in the 1980 contract.

Q. In the 1980 contract?

A. Yes.

Q. Has the rate, without specifying what the rate is, has the rate changed since 1980?

A. Not to my knowledge.

Q. Have you ever seen Plaintiff's Exhibit 35, the April 27 letter from someone unknown to you, someone's whose signature is not apparent?

A. Well, you know, I don't recall this particular letter. I just don't remember.

Q. The letter asks for a countersignature in a space below.

Is it the practice in your office for you to provide such a countersignature when it is requested?

A. Me?

Q. Yes.

MR. SLATTERY: Objection, ambiguous.

THE WITNESS: No.

BY MS. PHARES:

Q. Who does?

A. Generally, I would say it would be Tony DeAngelo.

Q. Anyone else?

A. Not to my knowledge.

Q. If you would refer to Plaintiff's Exhibit 36, Mr. Bourque.

Do you recall this letter?

A. Yes.

Q. Can you identify any of the handwriting that is written on it?

A. Some of it.

Q. Would you, first referring to the circle and the "okay" on sort of the mid right, do you know who wrote that?

A. I am not sure.

Q. What about the writing in the lower left-hand corner?

A. I am not sure.

Q. Do you recognize the writing at the very top?

A. Yes.

Q. What is that?

A. That is my writing.

Q. Would you read it?

A. It says "4/8/91-."

Q. And then what?

A. "VN to Ret Call."

Q. What does that mean?

A. Vince Notaro to return call.

Q. At the time this was written, do you understand this to be the agreement relating to the price terms between TDI and Amtrak for the Penn Station Spectacular?

MR. SLATTERY: Objection to the extent it calls for a legal conclusion. The document speaks for itself.

Let me remind the witness to the extent he can answer the question without relating to the specific price terms, that would make our lives easier.

MS. PHARES: Yes.

(The pending question was read.)

THE WITNESS: This letter sets forth the proposal.

BY MS. PHARES:

Q. Do you understand that that proposal was ever agreed to? Do you know whether it was ever agreed to?

A. To the best of my knowledge it was agreed to.

Q. Do you know in what document it was agreed to, if any?

A. No, I don't remember.

MS. PHARES: Could you read back the last question and answer.

(The record was read as requested.)

BY MS. PHARES:

Q. Do you know if this is the document that sets forth the current compensation for Amtrak from TDI for The Spectacular?

MR. KOHANE: Objection.

MR. SLATTERY: Same objections, but you can answer the question.

THE WITNESS: I don't think so. I don't think this is the one.

BY MS. PHARES:

Q. Do you ordinarily, Mr. Bourque, are you the signatory for Amtrak on a contract that sets price terms with TDI for advertising?

A. Am I the signatory?

Q. Yes.

A. Signatory, meaning I sign it.

Q. That's right.

A. No.

* * *

[43:2 - 44:15] Q. You said earlier you have responsibility for advertising at Penn Station; correct?

A. Some responsibility.

Q. What is the responsibility?

A. My responsibility relates to—on The Spectacular, just The Spectacular?

Q. No. I am asking in general.

A. My role with respect to The Spectacular is the approval of copy and to approval of the business terms.

Q. When you say the business terms, like the financial terms we were just describing.

A. Yes.

Q. Do those terms relate only to The Spectacular or to all advertising?

MR. SLATTERY: Objection, ambiguous.

You can answer it.

THE WITNESS: Financial terms—say that again, please.

BY MS. PHARES:

Q. Does your responsibility relate to the financial terms just with regard to The Spectacular or does it also include the financial terms with respect to what I will refer to as non-Spectacular advertising?

A. Just The Spectacular.

Q. Who is responsible for the financial terms of the non-Spectacular advertising?

MR. SLATTERY: Objection, foundation.

MR. KOHANE: Objection, foundation.

MR. SLATTERY: And ambiguous.

BY MS. PHARES:

Q. If you know.

A. I don't know.

* * *

[50:18 - 56:16] Q. It is correct, is it not, or is it your understanding that TDI arranges for the placement of advertising in Penn Station in spaces operated by Amtrak; is that correct?

A. Yes, generally, I think that is correct.

Q. Does TDI send you copies of that, of the artwork or of the copy of any of that advertising for review?

MR. SLATTERY: Wait a second. Anywhere in Penn Station?

MS. PHARES: Anywhere in Penn Station that Amtrak controls.

MR. SLATTERY: Including the Spectacular?

MS. PHARES: Aside from The Spectacular.

THE WITNESS: Aside from The Spectacular.

BY MS. PHARES:

Q. And the manned exhibits.

A. Aside from The Spectacular and the manned exhibit, no.

Q. Is there a regular procedure for review of the copy and the artwork for The Spectacular?

A. Yes, generally I would present it to Tony DeAngelo for the approval for review and approval.

Q. Let's slow down a little bit. Is there a regular procedure for how you receive the material?

MR. KOHANE: Objection.

Foundation. He can obviously speak from his side.

Q. How do you receive the work that you approve, Mr. Bourque?

A. Generally TDI sends me the copy.

Q. For our purposes, do you mean copy to mean both the writing, any written material and any artwork?

A. Generally, I mean when I say copy, everything, the whole thing.

Q. Everything, okay.

How does TDI generally send it to you?

A. Generally through the mail.

Q. What do you do when you receive it?

A. Generally, I review it with Tony DeAngelo.

Q. Do you make an initial review by yourself.

A. What do you mean by "initial review"?

Q. Do you review it by yourself without first consulting Mr. DeAngelo?

A. When the letter comes in, I look at it. Is that what you mean by an initial review?

Q. When it first comes in and you look at the letter, do you look at what is attached to it?

A. Generally, before I would present it to Mr. DeAngelo, I would look at what it is.

Q. Do you formulate your own recommendation about whether or not to accept the advertising?

A. I provide my thoughts to Mr. DeAngelo.

Q. How do you provide your thoughts to Mr. DeAngelo?

A. Sometimes verbally, sometimes—primarily verbally.

Q. Do you ever provide it to Mr. Pross?

A. Mr. Pross has been in his position for about a year. During that time I don't recall there being any copy.

Q. Typically, you just confer with Mr. DeAngelo?

MR. SLATTERY: Just to clarify, you are asking him what his previous practice has been?

MS. PHARES: Yes.

MR. SLATTERY: Okay.

THE WITNESS: Prior to Mr. Pross, I think that prior to Mr. Pross that there were instances when I would present it to, say, to Mr. LaCroix who would then present it to Mr. DeAngelo.

BY MS. PHARES:

Q. When you say there were instances, was that your regular procedure?

A. Generally, I would present it to—generally Mr. DeAngelo would make the final decision.

Q. Did you ever use a form to make your recommendation?

A. What do you mean by "form"?

Q. I mean, for example, something that sets out the particular thing being reviewed that notes line for approval authority that includes your recommendation, maybe a short discussion of the particular contract and its terms?

A. I think I did that prior to the A&S being approved.

Q. Do you recall why you stopped doing that?

A. That was at the start of a contract.

Q. Do you usually do that at the start of a contract; prepare such a form?

A. I am not sure, I don't recall.

Q. Do you recall preparing such a form at the beginning of the contract with A&S?

A. I am not sure.

Q. Do you maintain files in your office—let's stop. Before that, when Mr. DeAngelo makes his final decision, how is the

decision recorded? Is there a memorandum that indicates he has approved or not approved?

MR. SLATTERY: Objection, assumes facts not in evidence. You can answer the question.

THE WITNESS: Generally, we advise TDI.

BY MS. PHARES:

Q. So, just to hurry this up, your letter to TDI then is the only record of the decision that has been made by Amtrak?

MR. SLATTERY: Wait a second. I hate to slow things down, but I have the same objection.

THE WITNESS: It might be a phone call. It wouldn't necessarily be a letter.

BY MS. PHARES:

Q. So if there is no letter to TDI, then there is no written record at Amtrak as to whether or not Amtrak has approved an advertisement?

A. I am not sure.

Q. When you discuss a particular advertisement with Mr. DeAngelo, do you, is it your practice to show him the copy?

A. Yes.

* * *

[57:15 - 63:22] MS. PHARES: I would like to mark for identification a document dated August 20, 1987 entitled Justification of Spectacular Sign Agreement to A&S Stores.

And as 38, a letter dated September 14, 1987 from Vincent Notaro to Bruce Bourque.

(Plaintiff's Deposition Exhibit-Nos. 37 and 38 were marked for identification. Exhibits retained by counsel.)

BY MS. PHARES:

Q. Mr. Bourque, is Plaintiff's Exhibit 37 the kind of form that you described earlier that you used when preparing a recommendation for new contract for The Spectacular?

A. Generally, yes.

Q. This document has comments on a second page; is that correct?

A. Yes. This is generally—

Q. —the way you prepare recommendations for a new contract?

A. Yes.

Q. Does the comment section ever exclude comments on the copy?

MR. SLATTERY: Are you asking if it has ever been included in any such form he prepared?

THE WITNESS: I don't know.

BY MS. PHARES:

Q. You don't remember?

A. I don't remember.

Q. If you would look at Plaintiff's Exhibit 38, I am just going to use as an example the kind of transmittal letter you described earlier you receive from TDI.

MR. SLATTERY: Objection. The document speaks for itself.

You can answer it.

THE WITNESS: I don't remember this. Well, is this generally—

BY MS. PHARES:

Q. Yes.

A. Generally, I would say this is what TDI sends.

Q. Although we have clarified this at another deposition, this letter says Winston Network.

Do you understand Winston Network to be the same organization we refer to as TDI?

A. I would defer that to counsel.

Q. Did Winston Network change its name in the time you have been at Amtrak?

A. I am not sure.

Q. Well, have you always dealt with either an organization named Winston Network or TDI?

A. Yes.

MR. KOHANE: Or AMNI America.

THE WITNESS: Yes or AMNI.

BY MS. PHARES:

Q. When you review copy, you make your initial examination of copy that you receive from TDI, are there any advertising standards that you apply?

A. What is an advertising standard?

Q. How do you decide whether or not the copy should be approved?

A. Yes.

Q. There are advertising standards? Is that what you meant when you said "yes"?

MR. SLATTERY: I don't think the witness is finished answering the question.

THE WITNESS: Yes, we have standards. I am not sure if you call them advertising standards.

BY MS. PHARES:

Q. Fair enough. What are the standards?

A. Well, for The Spectacular, we are very concerned about a number of things because of its large size and its influence over the station.

Q. What are the factors?

A. Political. We don't accept political ads, pornographic, competitors.

Q. Anything else?

A. Beyond that, we are concerned with the appearance.

Q. Anything else?

A. What was the question?

Q. You told me there were a number of factors that influence—

A. My initial thinking?

Q. I was just asking you what those were.
A. My initial look-see. Yes.
Q. Are these guiding factors, are they written anywhere?
A. Yes. Generally.
Q. Where?
A. They are written in the 1980 agreement, to the best of my knowledge.
Q. Have you ever looked at the 1980 agreement?
A. Yes.
Q. Have you looked at the 1980 agreement before this litigation?
A. Yes.
Q. When?
A. I don't recall.
Q. Why did you look at the 1980 agreement?
A. I looked at the agreement—I looked at all the agreements when I joined Amtrak.
Q. Did you ever look at the agreement after that?
A. I looked at agreements at other times to clarify, not referring to this one in particular.
Q. I am referring just to the 1980 agreement.
A. Just to the 1980 one?
Q. Right.
A. I don't recall.
Q. So you read the 1980 agreement when you joined Amtrak?
A. Yes, at some point after that.
Q. Do you know at what point after that?
A. I don't recall when.
Q. When did you start reviewing advertising copy?
A. I don't recall.
Q. Well, did you review advertising copy when you were a project manager?
A. I think so. I think so.
Q. Who told you to read the 1980 agreement?
MR. SLATTERY: Objection. That assumes facts not in evidence.

Q. If anyone?
A. I don't recall anybody particularly telling me to read specifically any agreement, but as part of my job I read, you know, I tried to read all the agreements. Not all—
Q. You joined Amtrak in 1984; is that correct?
A. Yes.
Q. The 1980 agreement was in effect when you joined Amtrak; is that correct?
A. Yes.

* * *

[65:21 - 66:21] Q. Is there any other place besides the 1980 agreement where the factors you referred to are written down?
A. Could you repeat the question, please.
(The pending question was read.)
THE WITNESS: Prior to the—do you mean prior to or after the 1980 agreement?

BY MS. PHARES:

Q. After the 1980 agreement.
A. No, not to my knowledge.
Q. And is the only way you learned about the factors guiding your decision from the 1980 agreement?
A. I don't recall.
Q. Have you ever discussed the factors guiding your decisions with anyone at Amtrak?
A. I don't remember.
Q. Have you ever discussed it with Mr. DeAngelo?
A. I am sure at some point, but I don't recall when.
Q. Do you recall what you said, what as discussed?
A. No, I don't. No.

* * *

[107:9 - 122:15] Q. Were you involved in the review of the advertisement that is at issue in this lawsuit?
A. Yes.

Q. I am going to show you what has already been marked as Plaintiff's Exhibit 5.

Have you ever seen this letter before?

A. Yes.

Q. Is this the letter by which TDI transmitted Mr. LeBron's copy to you?

A. Yes.

Q. The letter states on its face that it was sent by Federal Express.

Do you recall when you received the letter?

A. No, not exactly.

Q. Does the date stamp at the top, is that stamped onto documents in your department when they are received?

A. Yes.

Q. So, can we assume it was received on December 8th, 1992?

A. Well, I was out of the office on that day.

Q. Is it customary or is the procedure in your office for documents to be stamped when they are received or only when you are in the office?

A. When they are received.

Q. Do you recall when you first saw the letter?

A. I think that I saw the letter on the 9th.

Q. When you received the letter, did it include a copy and the artwork, whether together—I think they were separate?

A. I think it did.

Q. You think it did or you don't—

A. No, I think it did. Yes.

Q. Did you prepare a justification form like the one we looked at earlier that you prepared for A&S on Plaintiff's 37?

A. No.

Q. Why not?

A. Typically—well, generally, that form is used—generally that form is used after there has been an initial approval.

Q. What do you mean by that?

A. Can I see the form?

Q. Yes. Sure. It should be here, actually.

A. Well, in this case, given the time frame, the review period, I did not do a form like this.

Q. Is that why you didn't do a form like this?

A. The time period.

Q. What was the time period?

A. The shortness of it. The proposed start date of the advertisement.

Q. When was the proposed start date?

A. I think the start date was January 1 of 1993.

Q. On December 9th it would take you a lot of time to prepare a justification form; is that it?

A. I probably—I don't recall doing anything with this on December the 9th. I was out of the office on the 10th and 11th.

Q. When do you recall doing anything this with form, this letter and application?

A. On or about the 14th or 15th of December.

Q. From December 9th to December 14th or 15th, did you receive any calls from Tina Haut, the general counsel at TDI?

A. I am not sure.

Q. Did you receive any calls from Tina Haut in December in connection with this approval?

A. Yes.

Q. Do you know when they were?

A. No.

Q. Do you know how many calls you received?

A. No.

Q. Was it more than three?

A. I am not sure.

Q. Well, was it more than five?

A. I am not sure.

Q. Was it more than once?

A. It was more than once.

Q. What did she tell you when she called?

A. She was trying to get me to speed up the review process.

Q. Did she tell you why?

MR. SLATTERY: Since the witness answered before I had a chance to object, let me say I object to that question to the extent it seeks to elicit hearsay.

Q. Did she tell you why?

MR. SLATTERY: Same objection.

THE WITNESS: I am not sure if she did or not.

BY MS. PHARES:

Q. What did you tell her?

A. I said that I would. I said that I would, you know, do what I could.

Q. Mr. Bourque, do you know what an advertiser has to provide to TDI to put up in The Spectacular?

A. No.

Q. Do you know how long It takes to prepare it?

MR. SLATTERY: Objection, no foundation.

THE WITNESS: No.

MR. KOHANE: And form.

MR. SLATTERY: And ambiguous.

BY MS. PHARES:

Q. What happened on the 14th or 15th?

A. I brought the materials, the agreement and letters that I received from Tina Haut, to the law department.

Q. Is that a standard procedure?

A. In letters where cases are cited and they are coming from lawyers, then I would bring them to the law department.

Q. Did the material that Tina Haut sent you include letters?

A. Yes.

Q. Do you know who the letters are from?

A. Do I know? They came from attorneys for Mr. LeBron.

Q. Was it more than one letter?

A. Yes.

Q. Do you remember how many letters there were?

A. I think there were two letters.

Q. Were there any letters in that, aside from the transmittal letter from Ms. Haut, were there any letters of Ms. Haut's included in the materials you received?

A. Aside from—

Q. Aside from Plaintiff's Exhibit 5 you have before you.

A. Yes.

MR. KOHANE: If I may, these other letters, I assume, were not included in the same—if you don't want to answer that question, don't. I assume they were not included with her original December 7th letter?

THE WITNESS: No. No.

MS. PHARES: That is what I understood.

THE WITNESS: No, sorry.

BY MS. PHARES:

Q. How did you receive these other letters, Mr. Bourque?

A. The other letters were sent to me by TDI.

Q. When were they sent?

A. I think they were sent on the 14th by fax.

Q. Why were they sent?

MR. KOHANE: Objection.

Q. Did someone ask for the letters? Did you ask TDI to send letters?

MR. SLATTERY: We have three pending questions.

MS. PHARES: I beg your pardon.

MR. SLATTERY: Which question do you want to have him answer so I know which one I should consider objecting to?

BY MS. PHARES:

Q. How did the letters come to be sent to Amtrak?

MR. KOHANE: Objection to the form of the question.

MR. SLATTERY: Objection, ambiguous.

MR. KOHANE: Calls for speculation.

MR. SLATTERY: And calls for speculation.

MR. KOHANE: I think whether he asked for the letter is a better one.

BY MS. PHARES:

Q. Did you ask for the letters?

A. I don't recall.

Q. In your conversations with Ms. Haut, did she tell you there were any letters?

MR. SLATTERY: Objection, ambiguous and to the extent that it calls for hearsay.

THE WITNESS: I don't remember.

BY MS. PHARES:

Q. Let me see if I can reconstruct. On December 7 you received Plaintiff's 5 with the attachments, Mr. LeBron's copy?

MR. SLATTERY: That mischaracterizes the witness' testimony.

Q. On December 8th it was received at Amtrak. On December 9th you saw it?

A. Right.

Q. On December 14th you took that material plus these letters that you have now described to the law department?

A. Yes.

Q. But you don't have any idea how those letters came to be transmitted to Amtrak?

MR. KOHANE: Objection. Hold on.

Q. You said they were sent by fax.

MR. KOHANE: Can we go off the record?

MS. PHARES: Yes.

(Discussion off the record.)

BY MS. PHARES:

Q. Did you ask Ms. Haut to fax the letters to you?

A. I don't recall.

Q. Did the letters come from Ms. Haut?

A. Yes, I think so.

Q. Do you have any question about it?

MR. SLATTERY: Objection. There is no foundation. It calls for speculation.

MR. KOHANE: They appear to; is that right?

THE WITNESS: They appear to.

BY MS. PHARES:

Q. Who did you take them to in the law department?

A. Maria Green.

Q. I am not interested in your conversations with Ms. Green or the substance of them.

Did you discuss the matter with Ms. Green on December 14th or 15th?

A. Yes.

Q. Did you discuss the matter with anyone else on December 14th or 15th?

A. I may have mentioned it in passing to Don Pross.

Q. Do you recall what you said to Mr. Pross?

A. No.

Q. Do you recall what he said to you?

A. No.

Q. Did you show the material to Mr. Pross?

MR. SLATTERY: I don't think we established he even had a conversation with Mr. Pross.

Q. When you say you mentioned it in passing to Mr. Pross, what do you mean?

MR. SLATTERY: Mischaracterizes the witness' testimony.

MR. KOHANE: Objection.

THE WITNESS: It means if I did, if I talked to him at all, it was probably just to say that I had gotten a proposal in that I brought it over, you know, that and the agreement over to the law department.

That is if I mentioned it.

Q. I understand.

What, if anything, happened after that, after December 15th or—14th or 15th?

MR. SLATTERY: Other than the filing of this lawsuit?

MS. PHARES: Well, I mean lots of things happened after that, but what in connection with this advertisement?

THE WITNESS: I don't think anything happened until the 17th.

BY MS. PHARES:

Q. How do you recall it was the 17th?
A. We were in New York for meetings.
Q. Who is "we"?
A. Tony DeAngelo, myself, Don Pross and Maria Green.
Q. Was the matter raised on December 17th?
A. Yes.
Q. What were the circumstances?
A. We were at dinner.
Q. On December 17th?
A. Yes.
Q. Is that a Thursday, do you recall?
A. It seems to me it was a Thursday.
Q. Were all four of you at dinner?
A. Yes.
Q. Did you raise the subject?
A. Probably. Probably. I don't remember, but probably.
Q. What did you say and what did Mr. DeAngelo say?
MR. SLATTERY: Objection. No foundation.
You can answer the question.
THE WITNESS: It seems to me what, you know, what I remember was that I showed him the materials. He said that the advertisement was political and that, you know, it should be rejected on that basis.

BY MS. PHARES:

Q. Now, I have two questions.
First, when you saw the advertisement did you think it was political?
A. My initial reaction was that it was political.

Q. So on that ground, did you decide our recommendation was that it not be accepted by Amtrak?
A. That was my initial thinking.
Q. On the 14th and 15th, when you took the matter to the law department, did you still think it was political?
A. I suppose I did. I really hadn't given any more thought to the political content on that.
Q. In any of your calls with Ms. Haut, did you indicate to her that there was going to be a problem with the advertisement because it was political?
MR. SLATTERY: Objection, ambiguous.
THE WITNESS: I don't recall. What are we talking about? What period are we talking about?

BY MS. PHARES:

Q. Well you weren't sure when Ms. Haut called?
A. Right.
Q. Whenever she called, during those telephone calls about the need for haste on the decision.
A. It seems to me after we made the decision we called Ms. Haut.
Q. That is the first time you told her?
A. I don't recall. I think so.
Q. When you showed the material to Mr. DeAngelo, did you say to him that you thought that you recommended it not be accepted because it was political?
A. Well, again, I don't remember, but I think what I did was I probably showed him the materials.
Q. When you say "the materials," what did you show him?
A. The copy.
Q. Anything else?
A. The letters.
Q. What did Mr. DeAngelo say to you?
A. Mr. DeAngelo said that he thought it was political.
Q. Did he say why?
A. I don't recall him saying why. I don't remember.

Q. Did he tell you should do anything about the application for approval?

A. He said that we should reject the application.

* * *

[125:4 - 127:20] Q. After Mr. DeAngelo made his decision about Mr. LeBron's advertisement at dinner on the 17th, what did you do?

A. A letter was prepared.

Q. Who prepared the letter?

A. It was prepared by the law department.

Q. Do you know who in the law department prepared it?

A. Yes. Maria Green.

Q. Was it decided at the dinner that Maria Green would prepare the letter or did you ask Maria Green to prepare the letter?

I will ask the first one.

MR. SLATTERY: It is two questions.

MS. PHARES: I will re-ask it.

BY MS. PHARES:

Q. Was it decided at dinner that Maria Green would prepare the letter?

A. I don't recall.

Q. Do you know, did you offer to prepare the letter?

A. I don't recall.

Q. Did Maria Green discuss the letter with you?

MR. SLATTERY: Let me just instruct the witness—

MS. PHARES: Sorry, yes.

BY MS. PHARES:

Q. I am not asking for what she said to you, Mr. Bourque. I am just asking whether she discussed it with you.

MR. SLATTERY: All she is asking for is a yes or no answer.

THE WITNESS: Yes.

BY MS. PHARES:

Q. When?

MR. SLATTERY: You can answer that question.

THE WITNESS: On or about December 21st through 23rd.

BY MS. PHARES:

Q. Monday through Wednesday before Christmas; is that correct?

A. That's right.

Q. I am going to show you what has been already marked as Plaintiff's 6. Is that the letter?

A. Yes.

Q. When is the first time you saw the letter?

A. I don't recall exactly.

Q. Who signed the letter, if you know?

A. Yes, I do know.

Q. Who signed it?

A. John Turpin signed for Tony DeAngelo.

Q. Do you know if Mr. Turpin discussed the letter with Maria Green?

MR. SLATTERY: Again, you can simply answer yes or no to this question and that should be the extent of your answer, if you know the answer to it.

THE WITNESS: No, I don't know.

* * *

[142:5 - 147:2] Q. Earlier when we began, Mr. Bourque, you said that your responsibilities included working with other railroads at Pennsylvania Station.

A. Yes.

Q. What does that include, what do you mean "working with"?

A. If there is construction work that they want to do that Amtrak reviews and approves.

Q. What other railroads do you refer to when you said that?

A. Long Island Railroad. New Jersey Transit, to some extent.

Q. Anything else?

A. Any other railroads?

Q. Or transportation systems?

A. I don't recall any other transportation systems.

Q. Why do you say the New Jersey Transit to some extent?

A. Because there has been more work related to the Long Island Railroad.

Q. What kind of work have you coordinated with the Long Island Railroad?

MR. SLATTERY: Objection. The question is ambiguous and assumes facts not in evidence.

THE WITNESS: They are making improvements to the station.

BY MS. PHARES:

Q. When you say that, you mean that the Long Island Railroad is making improvements on the A level of the station; is that what you mean?

A. Yes, they are making improvements on the A level, but some of the work requires work to be done in the Amtrak premises.

Q. Can you give me an example?

A. Yes. An example would be an escalator that goes from the Amtrak premises to the Long Island Railroad premises.

Q. Anything else?

A. Yes. There would be piping, ducting.

There would be, for example, wiring, perhaps. There might be asbestos removal.

There might be an impact to traffic, to pedestrian traffic, as an entrance is closed off, for example, or narrowed as a result of construction.

Q. What would be your role in that kind of a problem?

A. Working with the Long Island to, you know, get the plans and disseminate the plans for review. Addressing objections. Working with the Long Island Railroad for any agreements that would be needed to formalize a consent.

Q. Agreements that would be needed to formalize the consent, consent by whom?

A. Consent by Amtrak to work in its premises by Long Island Railroad.

Q. Has the Long Island Railroad made changes on the A level where it is located requiring this kind of cooperation?

A. Yes.

Q. Does it go on on a continuous basis?

MR. SLATTERY: Objection, ambiguous.

Q. Well, when is the last time you had to cooperate with the Long Island Railroad in such matters?

MR. SLATTERY: Objection. Ambiguous and assumes facts not in evidence, not in the record.

THE WITNESS: Last week.

BY MS. PHARES:

Q. You say you come to Penn Station on a weekly basis.

Do you have occasion on each of your visits to handle coordination matters with the Long Island Railroad?

MR. SLATTERY: Objection, mischaracterizes the witness' testimony.

Answer it.

THE WITNESS: No, I don't work with the Long Island, you know, not every time I come up.

BY MS. PHARES:

Q. Can you give me a ballpark figure of how often?

A. No. Because it depends.

Q. You mean sometimes it might be all the time and sometimes not at all?

A. It depends on what work they are doing.

Q. Are they doing any work now?

A. Yes.

Q. What is it?

A. I really can't speak about, I don't have the knowledge to speak about their work.

Q. Are they doing any work that requires your coordination?

A. Yes.

Q. What are you doing in connection with the work that the Long Island Railroad is going?

A. What am I doing? Finding out what work needs to be done.

Q. The lease with the Long Island Railroad was made what, about four years ago; is that correct?

A. Yes.

Q. At that time were there any particular projects that required your coordinating real estate efforts with the Long Island Railroad?

* * *

[147:20 - 149:9] THE WITNESS: Yes.

BY MS. PHARES:

Q. What were they?

A. The assignment of leases.

Q. Anything else?

A. Termination of leases.

Q. Anything else?

A. Review of planned work.

Q. Anything else?

A. There was property management issues.

Q. By that you mean, I am just referring to earlier, the coordination with security, cleaning, maintenance; anything else?

MR. SLATTERY: Let me just state, since we had a very lengthy deposition, I do not recall whether that properly characterizes your testimony. If it doesn't characterize your earlier testimony, you should let Ms. Phares know that.

THE WITNESS: Yes, okay.

BY MS. PHARES:

Q. When you said review of planned work, what was the work that the Long Island Railroad was planning that required your review?

A. My recollection is that it involved air conditioning improvements, concourse improvements, probably ticketing improvements, escalator and stairway improvements.

Q. When you say "review," do you mean review in order to carry out the coordination between Amtrak and Long Island Railroad?

A. It means review in that some of the work involved permanent and/or temporary intrusions into the Amtrak premises. And/or would affect retail tenants.

Q. Do you—

A. And/or Amtrak's passengers.

* * *

[150:5 - 150:23] Q. Does the review you were describing, I am just not quite sure what you mean by that, does that also include a sense of approval of the planned work?

MR. SLATTERY: Note my prior objections to that.

You can answer the question.

THE WITNESS: Well, the purpose would ultimately be to approve work.

BY MS. PHARES:

Q: If they proposed something that didn't quite fit, you might go back and suggest an alternative, but the idea was to come up with something that would work; is that a fair characterization?

A. Yes. Basically to the extent they would propose work and we would voice objections to it and address those objections prior to any approval.

* * *

[155:4 - 159:16] Q. Do you recall just at the end of our conversation that you listed types of work that—I want to be careful, I don't want to mischaracterize, but there was a list of work, escalator, piping, ducting, wiring, asbestos removal that you described as examples of coordination with the LIRR?

A. Right. Construction coordination.

Q. Construction coordination?

A. Right.

Q. What I would like to ask you, are these examples that have occurred and if you would like, I can read the list so you can say yes or no?

A. The Long Island is the in the midst of a construction program. So some of the work probably has or will occur.

Q. When you said construction coordination, you were meaning to distinguish it from what other kind of coordination?

A. Real estate coordination.

Q. Do you have real estate coordination problems with the Long Island Railroad?

A. These aren't problems. They are just work—

Q. Issues?

A. Not even necessarily issues. Just work activities.

Q. Do you have real estate coordination work activity with the Long Island Railroad?

A. Yes.

Q. What is an example of that?

A. Well, for example, we terminated a retail store in the Amtrak premises so that the Long Island could construct an escalator.

Q. When did that happen?

A. What part?

Q. Well, for example, the termination of that lease?

A. The termination occurred, I am not sure exactly, within the last couple months, say.

Q. Can you give me an example of the kind of either, well, construction or real estate coordination work activities that

you have with the New Jersey Transit, with New Jersey Transit?

MR. SLATTERY: I think that assumes facts not in evidence, but you can answer it.

THE WITNESS: New Jersey Transit is contemplating work in the Amtrak premises that would affect, say, access to some retail stores, that might affect access.

BY MS. PHARES:

Q. That kind of a problem requires your input?

A. Input, yes.

MR. SLATTERY: Objection to the characterization.

Q. When you say—

A. Not a problem, just work.

Q. I didn't mean to say problem, whatever word that describes that as an activity.

When you say the New Jersey Transit is contemplating work in the Amtrak premises, are you referring to—what are you referring to?

A. Plans, review of plans.

Q. What kind of space, what is the nature of the space that New Jersey Transit occupies in the Amtrak premises?

A. The nature of the space?

Q. Yes.

MR. SLATTERY: Again, I am not sure that properly characterizes the witness' testimony.

You can answer it.

THE WITNESS: What kind of space does New Jersey Transit have in the Amtrak space?

BY MS. PHARES:

Q. Yes.

A. To the best of my knowledge, they have some locker space. They have, I am not sure. They have ticketing. They probably have storage space.

Q. Do you know if they have storage space?

A. Do I know?
Q. Yes.
A. No, I don't know.
Q. Is the work they are contemplating in the Amtrak premises in connection with their ticketing booths?
A. Not to my knowledge.
Q. Do you know what it is in connection with?
A. Yes.
Q. What?
A. They want to improve platform clearance times.
Q. How does their goal of improving platform clearance times relate to work in the Amtrak premises?
A. They want to construct an additional means of access from the platforms out of the station.
There may be other work they are planning, but that is the work I am most familiar with.

(At the conclusion of trial on January 27, 1993, Judge Pierre N. Leval directed each party to admit or deny the proposed findings of fact offered by the oppostion. Following his instructions, each party annotated the other side's submission. For the purpose of printing these documents, comments that the parties wrote in the margins are bracketed and follow the finding or the portion of finding to which they pertain. The parties' additions are underscored; the deletions are indicated by strike-outs.)

DEFENDANT AMTRAK'S PROPOSED FINDINGS OF FACT, INCLUDING PLAINTIFF'S ANNOTATED RESPONSE TO FINDINGS, ¶ 1-28

FINDINGS OF FACT

Nature of Amtrak and Its Ownership of Penn Station

1. Amtrak is chartered under the District of Columbia Business Corporation Act as a for-profit corporation. It has been in existence since 1971. *See* 45 U.S.C. § 541. **[Admit]**

2. The Real Estate and Operations Development Department of Amtrak is responsible for the profit making endeavors of the corporation outside of running the railroad. (DeAngelo Depo., pp. 8-9).[1] **[Admit]** Amtrak is not required to conduct its real estate operations in accordance with any federal law, other than those laws applicable to private business corporations. (DeAngelo Depo., pp. 164-165.) **[Deny Legal Conclusion; see Plaintiff's Findings ¶¶ 130-137.]**

3. Amtrak files a federal corporate income tax return with the United States government. (Exh. 9.) **[Admit]**

4. ~~Federal support for Amtrak covers approximately 20% of Amtrak's entire operating expenses. (Exh. 7, Inside Cover.)~~ **[Figures don't Reflect all federal subsidies]** Amtrak strives

[1] "DeAngelo Depo." refers to the deposition of Anthony DeAngelo, Amtrak's Vice President of Real Estate and Operations Development.

to be self-sufficient by the year 2000. (Report, Towards Self-Sufficiency in the Year 2000, dated June 1, 1991, Exh. K.) **[Admit]** ~~Amtrak's grant request to Congress for 1993 anticipates a reduction in federal support from 20% to 16.18%.~~ **[Figures don't Reflect all federal subsidies; see Plaintiff Findings ¶¶ 163-174, 177]** Amtrak Fiscal Year 1993 Grant Request and Justification, Exh. L, p. 4.) To the extent that Amtrak can increase its revenues through accepting commercial advertisements, it can decrease the amount it requests for a federal subsidy. (DeAngelo Depo., pp. 25, 132.) **[Admit]**

5. Although there are federal appointees on Amtrak's board, the only member of Amtrak's Board of Directors that is a federal employee is the United States Secretary of Transportation. (Exh. 7, p. 35.) **[Admit but all Board members are effectively chosen by the U.S.; see Plaintiff's Findings ¶ 113.]**

6. All preferred shares of Amtrak stock are held by the United States. Common shares are held by four private entities: The Grand Trunk Western Railroad Company; Burlington Northern Inc.; The Penn Central Corporation; and Soo Line Railroad Company. **[Admit; PX 86]**

7. Amtrak has its own telecommunication system, as its system is not tied in with that of the federal government. Additionally, Amtrak employees are not on a federal pay scale. Their retirement monies are paid into the Railroad Retirement Fund, as are the monies of all railroad employees. (DeAngelo Depo., pp. 144-145.) **[Admit]**

8. Penn Station was deeded from the Pennsylvania Tunnel and Terminal Railroad Company, a subsidiary of Penn Central, to Conrail, a ~~private~~ corporation which then conveyed the property to Amtrak, also a ~~private~~ corporation. (Exhs. 11, 12.)[2] **[Admit]** ~~The federal government currently is~~

[2] Numbered Exhibits are plaintiff's exhibits. Lettered Exhibits are defendants' exhibits. The parties have stipulated to the authenticity of all documents produced by Amtrak, TDI and plaintiff. (DeAngelo Depo., p. 154; Notaro Depo., p. 4.) ("Notaro Depo." refers to the deposition of Vincent Notaro, TDI's Senior Vice President of Franchise Development.)

~~involved to the limited extent that it holds a mortgage on the entire Northeast Corridor from Boston to Washington, including Penn Station.~~ **[see Plaintiff's facts ¶¶ 138-158, 169]** (DeAngelo Depo., p. 153.) The federal government also paid Penn Central for its properties, including Penn Station. (*Id.*, p. 162.) **[Admit]**

9. The Title Insurance Policy for Penn Station states that Amtrak owns the property in fee simple. (Amtrak's Fee Title Insurance Policy, August 10, 1988, Exh. M.) **[Admit]**

10. ~~Amtrak has complete control over the upper level of Penn Station. The New York City Transit Authority, Long Island Rail Road, New Jersey Transit and the Metropolitan Transit Authority have no power over Amtrak's use of that area.~~ (Gallagher Depo., pp. 162-163). **[Deny; Amtrak's use of property subject to leases, easements and other arrangements; see Plaintiff's Findings ¶¶ 191-208.]**

11. Amtrak operates Penn Station for multiple purposes, including to facilitate rail travel for its passengers and those of LIRR, NJT, and NYCTA, and commercial tenants at the station are ~~primarily~~ selected in part to serve the travelling public. (DeAngelo Depo. pp. 167-168, 199-200.) **[Admit; see Plaintiff's Findings ¶¶ 10, 11, 191-208]**

12. ~~The United States is not a party to any of Amtrak's advertising contracts for Penn Station, and there is no indication in any of these contracts that the United States exerts any influence over Amtrak's performance of these contracts.~~ (*See* Exhs. 2, 3, 4, 12.) **[Deny; U.S. - controlled Board exercises authority over advertising contracts; see PXX 58-60, 65, Plaintiff's Findings ¶¶ 59-62]**

13. Amtrak owns Penn Station and the Penn Station Spectacular. (DeAngelo Depo., p. 10; Exh. 18, p. 7; Exh. N.) **[Admit]**

Therefore, documents relied upon herein that were produced by any of the parties but were not marked as deposition exhibits have been lettered sequentially from the last defendant's exhibit marked at a deposition.

Amtrak's Advertising Policy and the Spectacular

14. The display at Penn Station known as the Spectacular is approximately 103 feet in length by 10 feet in width. It is located on the west side of the upper level of Penn Station. It is a curved structure that is lit up. **[Admit]** ~~and that dominates the main entrance into Amtrak's waiting room and ticket area.~~ **[Deny]** (Exh. F, p. 11; Exh. 54; DeAngelo Depo., p. 70.)

15. ~~Amtrak has a longstanding policy of not permitting political advertisements on the Spectacular.~~ (DeAngelo Depo., p. 48; Bourque Depo., pp. 61, 73, 74, 103.)[3] ~~Contrary to plaintiff's assertion that this policy was created only because of his advertisement, this policy dates as far back as 1967, when the Spectacular was constructed and 4 years before Amtrak came into existence.~~ (Bourque Depo., p. 61; Exh. 4, p. 12; Exh. 18, p. 5.)[4] ~~As a result of this policy, there never has been a political advertisement on the Spectacular.~~ (Notaro Depo., pp. 12-13, 17-18, 23-24, 37, 44, 54-55, 62-63; Exhs. 45, 48, 51, 52, O.) ~~This consistent policy is viewpoint neutral.~~ **[Deny; see Plaintiff's Findings ¶¶ 64-98]**

16. All advertisements and contracts for the Spectacular must receive prior approval from Amtrak. (DeAngelo Depo., p. 48; Haut Depo., pp. 51-52, 78; Bourque Depo., p. 51.)[5] Mr. DeAngelo makes the final decision whether to give such approval to an advertisement for the Spectacular. **[Admit]** (DeAngelo Depo., pp. 37, 48, 55.) Amtrak's prior approval policy is unique to the Spectacular. **[Admit]** ~~because of the~~

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[3] "Bourque Depo." refers to the deposition of Bruce M. Bourque, Project Director of Real Estate for Amtrak. [Admit] ~~Mr. Bourque is responsible for the financial terms of Spectacular advertising and for real estate matters at Penn Station.~~ (Bourque Depo., pp. 43-44.) **[Deny; See Plaintiff's Findings ¶¶ 59, 72.]**

[4] The 1980 contract between Amtrak and TDI (Exh. 4), ~~which refers to Amtrak's policy regarding political advertising,~~ was in effect when Mr. Bourque came to Amtrak in 1984. (Bourque Depo., p. 63.) **[Admit]**

[5] "Haut Depo." refers to the deposition of Tina Kowalsky Haut, TDI's general counsel.

~~Spectacular's dominant position in Penn Station, its brilliance in terms of candle power and its ability to reach 38% of Amtrak's passengers.~~ **[Deny]** (DeAngelo Depo., pp. 57-58.)

17. ~~Because the Spectacular is a unique, enveloping structure, it is reasonable for Amtrak to have policies specific to it.~~ **[Deny; not evidence]** (January 4, 1993 Hearing, pp. 23-24.) It is the most prominent display in Penn Station. (DeAngelo Depo., p. 70; Bourque Depo., p. 60.) Plaintiff concedes that ~~it is virtually impossible not to~~ one would definitely notice the Spectacular as one enters the Amtrak terminal from the escalators that are directly opposite it. (Lebron Depo., pp. 84-85; Exhs. 50A, 50B, 50C.)[6] **[Admit]**

18. ~~Amtrak defines political advertising as non-commercial advertising. Commercial advertising promotes a particular product or service.~~ (DeAngelo Depo., pp. 33-34; Bourque Depo., p. 73.) **[Deny; see Plaintiff's Findings ¶¶ 64-98]**

19. In order to ensure that it will not lose control over the content of the advertisements being displayed on the Spectacular, Amtrak has refused at least one request to lease the Spectacular and then sublease it to unidentified advertisers precisely because of this concern. (DeAngelo Depo., pp. 53-55.) **[Admit]**

20. ~~Amtrak's general policy is that it will not accept political advertising.~~ **[Deny; Practice Contradicts alleged unwritten policy.; see Plaintiff's Findings ¶¶ 94-98]** ~~As an example,~~ According to Gallagher, there were no political signs in Penn Station during the 1992 Democratic National Convention in New York City. (Gallagher Depo., pp. 109-110; *see* DeAngelo Depo., pp. 62-64.)[7] ~~It also is Amtrak's policy not to accept advertisements of its competitors, of pornography, of potentially controversial matters and matters that would be objectionable to Amtrak's riding public.~~ **[Deny; Practice Contradicts alleged unwritten policy.; see**

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[6] "Lebron Depo." refers to the deposition of plaintiff Michael A. Lebron.

[7] "Gallagher Depo." refers to the deposition of Michael J. Gallagher, Amtrak's Manager of Stations in New York.

Plaintiff's Findings ¶¶ 94-98.] These policies are not formally written~~, but are longstanding~~ and are known only to both Mr. DeAngelo and Mr. Bourque, ~~the~~ Amtrak employees responsible for real estate matters at Penn Station. (DeAngelo Depo., pp. 29-31, 48; Bourque Depo., pp. 61-64.) **[Admit; see Plaintiff's Findings ¶¶ 73.]**

21. Mr. DeAngelo stated Amtrak follows this policy because the Spectacular is an overwhelming structure and the first thing that many Amtrak passengers see when they enter Penn Station. Amtrak does not want to force its passengers to view advertisements on the Spectacular that they may deem offensive or divisive. (DeAngelo Declar., para 4.)[8] **[Admit]**

22. Although Amtrak does not have a prior approval policy for advertising displays other than the Spectacular, Amtrak can object to an advertisement after it has been displayed and can have it removed. (DeAngelo Depo., p. 63.) **[Admit]**

23. ~~In accordance with its policy limiting the types of advertisements that will be permitted in Amtrak facilities,~~ Amtrak has ordered the removal of an advertisement placed by a competing airline. (DeAngelo Depo., p. 72.) **[Admit]**

24. A kiosk, such as the one which contains an advertisement for the magazine "The Plain Truth," (which is located to the side of an escalator in front of the Spectacular), is significantly smaller than the Spectacular, ~~and less noticeable. For these reasons,~~ advertisements on kiosks are not subject to prior approval. (Lebron Depo., pp. 151-153; DeAngelo Depo., p. 58.) Mr. DeAngelo was unaware of the "Plain Truth" magazine advertisement. (DeAngelo Depo., pp. 77-79.) **[Admit]**

25. ~~There is no evidence that the government coerces or encourages Amtrak to bar political advertising on the Spectacular or plays any role in its decision to do so.~~ **[Deny;**

[8] "DeAngelo Declar." refers to the Declaration of Anthony D. DeAngelo, dated December 31, 1992, submitted with Amtrak's January 4, 1993 letter to Judge Mukasey, supplementing Amtrak's Memorandum of Law.

government Requires Amtrak to maximize Revenues thru private contracts and alleged policy against political advertising is driven by Revenue concerns.; see Plaintiff's Findings ¶¶ 79, 179]

26. Amtrak has ~~voluntarily~~ made the decision to permit opportunities for the dissemination of political messages through political speech, placards, soliciting and leafletting at Penn Station. It ~~accordingly~~ has developed regulations ~~on its own, without any federal or state directive,~~ concerning the exercise of free speech at Penn Station. These regulations allow individuals and groups to receive permits to engage in political speech with passengers and other users of the station, to display placards, distribute political literature and to solicit donations on behalf of political organizations. Permit holders must agree to abide by the regulations, which prohibit permit holders from leaving any display unattended. (Exh. 10, pp. 4, 7.) **[Admit; see PXX 10; Amtrak has no evidence of origin of policy]**

27. These regulations do not apply to advertising in Penn Station. (Gallagher Depo., p. 163.) Accordingly, there is (ILLEGIBLE). **[Admit]**

28. William Delaney has no responsibility for the use of the Spsectacular at Penn Station, ~~and therefore is not knowledgeable regarding Amtrak's policies concerning the Spectacular.~~ (Delaney Depo., pp. 19-20.)[9] Mr. Delaney does not, as part of his duties, review any proposed advertisements prior to their display in Amtrak facilities. (Delaney Depo., pp.

[9] ~~Moreover, any claimed admissions by Mr. Delaney, a Project Manager in Amtrak's Real Estate Department, allegedly summarized in Jonathan Bloom's affidavit in support of plaintiff's application for a temporary restraining order, must be disregarded because they were obtained in violation of the New York Code of Professional Responsibility, rules DR 7-103 and DR 7-104.~~ (Bloom Depo., pp. 49-51.) (Jonathan Bloom is one of plaintiff's attorneys.) ("Delaney Depo." refers to the deposition of William P. Delaney.) *See Garrett v. Nat'l R.R. Passenger Corp.*, No. 89-8326 (E.D. Pa. Aug. 14, 1990); Fed. R. Evid. 801(d)(2)(D). *See also Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990). **[Deny, and Plaintiff is not Relying on the Bloom Aff.]**

20-21.) With the exception of one instance in which he was' instructed by his supervisor, John Turpin, to arrange for the removal of an advertisement for an airline that competed with Amtrak because the advertisement violated Amtrak's advertising policies, Mr. Delaney has never been called upon to determine whether any advertising already in place in an Amtrak facility should be removed because no one has ever complained. **[see Plaintiff's Findings ¶ 8]** . (*Id.*, pp. 16-17, 32-34.) If such an issue arose, he would consult with Mr. Turpin, who reports to Mr. DeAngelo. (*Id.*, pp. 11, 32.) **[Admit but Delaney does Review displayed advertising; See Gallagher Dep. 51:18 - 52:11]**

Plaintiff's Dealings with TDI and Preparation of the Display Proposal

29. Whatever knowledge TDI had of Amtrak's ban on political advertising is irrelevant to Amtrak's policy because not only TDI but the plaintiff himself knew that their contract was subject to Amtrak's approval. (Haut Depo., pp. 16-17; Lebron Depo., p. 130.)

30. The contract between plaintiff and defendant TDI provides:

> "All advertising copy is subject to approval of TDI and the Transportation Facility concerned as to character, text, illustration, design and operation."

(Exh. F, p. 8.) Plaintiff understood these provisions of his November 30, 1992 contract with TDI. (Lebron Depo., p. 130.)

31. The contract between plaintiff and defendant TDI also provides:

> "If for any cause beyond its control TDI shall cease to have the right to continue the advertising covered by this contract, or if the Transportation Facility concerned should deem such advertising objectionable for any reason, TDI shall have the right to terminate the contract and discontinue the service without notice.

(Exh. F, p. 8.)

32. Plaintiff had seen a form of contract similar to the one he signed with TDI as early as 1983, when he contracted with TDI to display his work in the Washington, D.C. subway system. (Lebron Depo. pp. 125-126.) In entering the current contract with TDI, plaintiff relied, in large part, on his own prior experience with the terms of his earlier contract with TDI, (Lebron Depo., pp. 128-129), which had similar language regarding approval by TDI and the "Transportation Facility." (Lebron Depo., p. 126.)

33. Even if plaintiff did not initially know that the "Transportation Facility" referred to in his contract with TDI was Amtrak (Lebron Depo., p. 89), he still knew that the contract was subject to the "Transportation Facility's" approval of the copy. (Exh. F, p. 6.) Plaintiff never learned the identity of the "Transportation Facility" and never communicated with Amtrak regarding the advertisement. (Lebron Depo., p. 104.)

34. Plaintiff was informed by TDI's general counsel that Amtrak had the absolute right to approve or reject the copy. (Lebron Depo., p. 131; Exh. F, p. 20.)

35. The contract between Amtrak and TDI provides:

> "All advertising material, exhibit material, notices and advertisements, and their manner of presentation and design, shall be subject to approval by Amtrak, which may disapprove any such items at its own discretion."

(Exh. 2, Section 6; Exhs. 37, 38.)

36. Contrary to the allegation in ¶ 44 of plaintiff's complaint, TDI is an independent contractor, not Amtrak's agent. The contract between Amtrak and TDI specifically provides that TDI may not enter into contracts in the name of the "Transportation Facility." (Exh. 2, Section 1.) Indeed, while plaintiff alleges that Amtrak and TDI have an agent-principal relationship, Mr. Schwartz, the TDI account executive with

whom plaintiff was dealing, did not even know that Amtrak was the "Transportation Facility" referred to in the contract. (Lebron Depo., p. 89.) Amtrak is a TDI franchise. (Haut Depo., p. 12.) TDI pays Amtrak a percentage of the revenues it independently collects from Spectacular advertisers. (Exhs. 34, 35, 36.)

37. As far back as 1967, the Pennsylvania Railroad, the original owner of Penn Station, and TDI had a licensor-licensee relationship which expressly provided that TDI construct and maintain the Spectacular, at its own cost and expense, for sale of advertising space to advertisers. (Exh. 18.)

38. In August of 1992, when plaintiff contacted TDI, he did not describe the content of his proposed display. Plaintiff did not tell Mr. Schwartz that his work was political. (Schwartz Depo., p. 101.)[10] It was not until December 2, 1992, after his contract with TDI had been signed by TDI, that plaintiff finally revealed the specific content of his work. (Lebron Depo., p. 63; Exh. F, p. 19.) Plaintiff admits that his proposed display is controversial and that some people may be offended by it. (Lebron Depo., pp. 97-98.)

39. Plaintiff knew that "owing to the unusual nature of the work," TDI and/or Amtrak might not approve of his advertisement. (Lebron Depo., pp. 81-82; Exh. F, p. 19.) He also knew that "this was not your typical advertisement, and that it was quite likely that TDI would have some questions about it." (Lebron Depo., p. 75.)

40. Although he was asked repeatedly by TDI about the nature of the work and to submit copy, the first time anyone at TDI knew the specific content of the advertisement was when plaintiff forwarded the copy to TDI on December 2, 1992. (Lebron Depo., pp. 53, 62-63.) However, plaintiff's own lawyers reviewed the advertisement with a "fine tooth comb" at least four times over a period of a few months

[10] "Schwartz Depo." refers to the deposition of William B. Schwartz.

before giving it the "Green Light". (Lebron Depo., pp. 66-68; Exh. F, p. 19.) When Mr. Schwartz of TDI finally saw the advertisement, he was surprised by its content. (Lebron Depo., pp. 93, 203-204; Schwartz Depo., p. 111.)

Amtrak's Timely Rejection of Plaintiff's Proposal

41. Amtrak notified TDI of its decision to reject the advertisement in a timely manner, at the latest on or prior to December 23, 1992. (Exh. 6.) (Bourque Depo., pp. 130-131.) Mr. Bourque, who initially sees the copy of Spectacular advertisements submitted for Amtrak's approval, was not in the office when the copy of plaintiff's advertisement was received on December 8, 1992, nor was he in the office on December 10, 11, or the morning of Monday, December 14, 1992. (Bourque Depo., pp. 108, 110, 124.) While Mr. Bourgue glanced at TDI's letter (Exh. 5) on December 9, he did not examine it until the following week. (Bourque Depo., p. 110.) Therefore, Amtrak had no knowledge regarding the nature of plaintiff's advertisement until Mr. Bourque reviewed the copy from TDI on December 14 or 15, 1992.

42. When Mr. DeAngelo, who has final approval on Spectacular advertisements, was advised of plaintiff's advertisement on December 17, while in New York City with Mr. Bourque, he rejected it. (DeAngelo Depo., p. 112; Bourgue Depo., pp. 119-120, 122.) Mr. DeAngelo is not sure he saw plaintiff's display before he disapproved it. It was described to him and he was told that it was non-commercial. He rejected it on that basis. (DeAngelo Depo., pp. 112-114). He did see a small representation of plaintiff's proposed display at a later time. (DeAngelo Depo., p. 113; Exh. G.)

43. Mr. Bourque did not return to his office until midafternoon on Friday, December 18, 1992. (Bourque Depo., pp. 160-161.) Amtrak's decision was communicated to TDI the following week. (Bourque Depo., p. 130.)

44. It normally takes at least 30 days for Amtrak to review ad copy for the Spectacular and then inform TDI of the decision. (Bourgue Depo., p. 161.) For example, in 1983, TDI

submitted copy for a Fujitsu commercial display for Amtrak's approval 29 days before the proposed installment date. Almost one month after the installment date had passed, Amtrak had not yet approved the advertisement. Amtrak lost revenue as a result of the delay. (Exh. 48.)

Reasonableness of Amtrak's Disapproval

45. Amtrak's long-established policy prohibiting political advertising is consistent with Amtrak's desires to create an environment conducive to the travelling public and to maintain and increase the number of its customers by not offending them. (DeAngelo Depo., pp. 29-31, 33-34, 48, 167-168, 199-200, 297; Bourque Depo., pp. 61, 73-74, 103; DeAngelo Declar., ¶ 4.)

46. As noted above, the Spectacular, a 103-foot long illuminated sign, dominates the upper level of Penn Station. (DeAngelo Depo., p. 70; Bourque Depo., p. 60.) There is nothing comparable to it in Penn Station. (Notaro Depo., pp. 10-11, 19.)

47. There are other legitimate reasons for Amtrak's policy against political advertising. For example, plaintiff himself recognized that there could be some difficulty with TDI approving the contract because the advertisement depicted a Coors beer can as a missile heading toward a number of rural Nicaraguans and therefore that Coors might claim the advertisement is libelous and a trademark infringement. (Lebron Depo., pp. 181-182.) Plaintiff was concerned that Coors might try to suppress his work if it discovered the advertisement before it was displayed. (Lebron Depo., pp. 189-190.)

48. Plaintiff was concerned .hat Coors might consider the advertisement defamatory. He spoke with his friend, Russ Bellant, the author of a book on Coors' philanthropy, (Lebron Depo., p. 70), and with his own attorneys, about this possibility. He did this partly because he did not want himself, TDI or the "Transportation Facility" to be sued for defamation. (Lebron Depo., pp. 153-156.) Plaintiff's own lawyers reviewed his proposal for several months to see if it was

libelous. (Lebron Depo., pp. 66-68; Exh. F, p. 19.) It is not unreasonable to assume that Coors would sue for libel based on the nature and content of plaintiff's advertisement.

49. Coors has in the past sued for libel where the Company was said to be associated with "ultra-right wing" causes such as the Ku Klux Klan. *Adolph Coors Co. v. Movement Against Racism and the Klan*, 777 F.2d 1538 (11th Cir. 1985). Plaintiff's advertisement associates Coors with these same causes. (Exh. G.)

50. Plaintiff also was concerned that the advertisement not be an infringement of Coors' trademark. (Lebron Depo., p. 179.) Plaintiff's display includes both Coors' trademark and trade name. (Exh. G.)

51. Coors has in the past sued successfully for trademark infringement. *Adolph Coors Co. v. A. Genderson & Sons. Inc.*, 486 F. Supp. 131 (D. Col. 1980); *Adolph Coors Co. v. Korr's Beer Distributing, Ltd.*, No. 77-1557 (6th Cir. June 21, 1979). *See also Adolph Coors Co. v. A&S Wholesalers, Inc.*, 1975 Trade Cas. (CCH) P60,187 (Feb. 27, 1975). It is not unreasonable to assume that a similar suit reasonably could be filed if plaintiff's artwork was displayed.

Plaintiff Has Suffered No Damages Based Upon Any Conduct By Amtrak; Plaintiff's Own Acts Caused Any Loss He Has Suffered

52. In the fall of 1991, plaintiff and his co-workers decided among themselves that the Spectacular should be the site for his work. (Lebron Depo., p. 44.) Plaintiff did not speak directly to Mr. Schwartz regarding the Spectacular until the spring of 1992. (Schwartz Depo., p. 66.) Plaintiff began designing the advertisement for the Spectacular in June 1992 (Lebron Depo., pp. 103-104), yet TDI did not sign the contract with plaintiff until November 30, 1992. (Lebron Depo., p. 10.) Plaintiff and TDI were still negotiating on July 8, 1992 (Exh. F, p. 10), and even on October 26, 1992 about the availability of the Spectacular (Exh. F, p. 15). Plaintiff's claim that he was relying on getting the Spectacular long before his

contract was signed is therefore incredible. (Lebron Depo., pp. 39-41.)

53. Plaintiff's work is not a time-sensitive political statement as long as Coors continues the practices which plaintiff seeks to bring to the public's attention. (January 4, 1993 Hearing, p. 27.) Plaintiff began working on this project in 1987. (Lebron Depo., p. 115.) At plaintiff's request and over defendants' objections, the trial on this matter was delayed from January 14, 1993 until January 27, 1993.

54. TDI signed the contract on November 30, 1992. Although plaintiff knew that the time for the display was approaching, he did not have the copy ready and delayed two more days in forwarding it to TDI. (Lebron Depo., pp. 62-63.) Although it takes up to three months to complete transparencies for the Spectacular, plaintiff left himself less than one month to prepare the transparencies, despite the busy Christmas season. (Notaro Depo., p. 14; Exh. F, p. 19.)

55. On December 4, 1992, Chris Culver of TDI told plaintiff that he thought that it would take a very long time for the proposed display to be approved by Amtrak and offered to make 500 other billboards elsewhere in New York City available to display the work. (Lebron Depo., pp. 102-103.)

56. Plaintiff never asked how large the billboards were that Mr. Culver offered to him to determine if they might be appropriate for his work (Lebron Depo., p. 137), nor did he ever inquire as to the price of any of those 500 billboards. (Lebron Depo., p. 139.) In fact, TDI leases billboards as large or larger than the Spectacular on the Major Deegan Expressway, the Brooklyn Expressway, on Broadway and Houston streets, and in the World Trade Center. (Schwartz Depo., pp. 49-51.)

57. As of December 4, 1992, and even at this time, plaintiff's work is not complete. Yet he is unwilling to try to make adjustments to the work so that it might fit on any of the 500 billboards that Mr. Culver offered to him. (Lebron Depo., pp. 131, 139-140.)

58. Plaintiff did not give any thought to what he would do with the work if the contract for the Spectacular was not executed. (Lebron Depo., p. 180.) For example, plaintiff received from TDI in 1990 or 1991 a package of materials containing maps of locations in the New York City metropolitan area where he might be able to display his work. Plaintiff filed this away and then lost it. (Lebron Depo., pp. 34-35.)

59. Plaintiff claims that his "reputation as an artist is largely created on the seriousness and consistency with which [he tries] and engage[s] broad audiences outside of a conventional gallery or museum environment on issues of public concern," yet he has accomplished this on only three occasions in the last 11 years. (Lebron Depo., p. 135.) His three past public displays in the New York City Transit System and the Washington D.C. Metro system only have reached the size of approximately four feet by five feet. (Lebron Depo., pp. 136-137.)

60. Plaintiff claims that he is irreparably damaged by not being able to represent his thoughts and feelings, through his artwork, in the venues of his choice. (Lebron Depo., pp. 202-203.) Yet, he is unwilling even to consider whether any of the 500 other venues offered to him by TDI might be appropriate for his work. (Lebron Depo., pp. 139-140.)

61. Plaintiff's assumption that TDI would have entered into a contract even if it had known about the anti-Coors advertisement was based on his belief that he had a "constitutional right" to the space. (Lebron Depo., pp. 183-184.) This belies plaintiff's claim that his reliance was based on any contract he had with TDI.

62. Plaintiff reluctantly conceded that one of the reasons he avoided showing the advertisement to TDI until it was nearly final, on December 2, 1992, was because he was afraid that TDI would not sign the contract in light of the work's anti-Coors nature. (Lebron Depo., p. 190.)

63. The first time plaintiff incurred out-of-pocket expenses for his display was January 1991. (Lebron Depo., p. 143.)

Plaintiff has not incurred any out-of-pocket expenses on the project since November 30, 1992, the day TDI signed the contract. (Lebron Depo., p. 144; Exh. F, pp. 21-65.)

* * *

(At the conclusion of trial on January 27, 1993, Judge Pierre N. Leval directed each party to admit or deny the proposed findings of fact offered by the oppostion. Following his instructions, each party annotated the other side's submission. For the purpose of printing these documents, comments that the parties wrote in the margins are bracketed and follow the finding or the portion of finding to which they pertain. The parties' additions are underscored; the deletions are indicated by strike-outs.)

PLAINTIFF'S PRE-TRIAL PROPOSED FINDINGS OF FACT INCLUDING DEFENDANTS' JOINT ANNOTATED RESPONSE TO FINDINGS, ¶ 1-209

(Supplemental Exhibit)

PRELIMINARY STATEMENT

This lawsuit challenges the attempt by the National Railroad Passenger Corporation ("Amtrak") and its agent, Transportation Displays Incorporated ("TDI"), to bar plaintiff Michael Lebron from displaying a political advertisement in the Penn Station Spectacular ("the Spectacular"), an illuminated billboard. Mr. Lebron, assured by Amtrak's agent, TDI, that there was no bar to political advertisements in the Spectacular, created an advertisement for that space and contracted to display it there during January and February 1993. Approximately one month after Mr. Lebron submitted his advertisement to defendants for review, however, and only two and a half days before the advertisement was to be displayed, TDI informed Mr. Lebron that Amtrak had rejected the advertisement because it violated an Amtrak policy against political advertisements in the Spectacular.

Plaintiff alleges that defendants' actions violate both his constitutional and contractual rights. His constitutional claims rest on a finding that for purposes of regulating speakers'

access to Penn Station, Amtrak should be treated as a state actor because of its symbiotic relationship with several government entities at Penn Station.

Amtrak was created and is controlled by the federal government. It would cease to exist were it not for annual federal subsidies in the hundreds of thousands of dollars. Because of this dependency, the federal government has a direct financial interest in Amtrak's advertising policies and practices, because a dollar earned by Amtrak is a dollar saved by the federal government. Amtrak's board, whose entire membership is appointed by the federal government, expressly authorized the Amtrak-TDI advertising licensing relationship that led to Mr. Lebron's contract. And Penn Station, the site of this dispute, was acquired for Amtrak by the federal government, paid for by the federal government, and cannot be leased or sold without the board's approval. These facts alone would be enough to find Amtrak a state actor.

However, the location of this dispute at Penn Station also implicates an even wider web of governmental interrelationships. Amtrak has entered into a complex set of relationships with government-run railroads and subways at Penn Station, including leasing of property, sharing of employees and physical space, undertaking of joint operations and projects, the grant of easements, and other contractual arrangements. These interrelationships essentially mean that it is impossible to say at any location in Penn Station where government stops and Amtrak begins. Thus, Amtrak must be treated as a state actor for purposes of this case because of its relationships with state, local and federal governments at Penn station.

Amtrak's "policy" against political advertising is unconstitutional for several reasons. First, the alleged "policy," of which only Messrs. Anthony DeAngelo and Bruce Bourque were apparently aware, is unwritten, has never been communicated to anyone at TDI, and is unknown to other Amtrak employees responsible for reviewing advertising copy. Even if said to exist, it is impermissibly vague, and therefore fails to provide prospective speakers with notice and leaves

Amtrak officials to apply their own subjective judgments. Any such policy, moreover, is flatly inconsistent with the written terms of Amtrak's contractual agreements with TDI, and has never before been enforced to bar any other political advertisement. A government entity would never be permitted to regulate speech on the basis of such a nebulous "policy," and therefore the policy, if there be one, must be invalidated.

Second, Amtrak's purported "policy" against political speech is an impermissible content-based restriction on speakers' access to a public space. Penn Station is a large, multi-purpose space that Amtrak has opened up for political communication. It allows people to distribute political literature, engage in political discussion, and display political placards. Other than with respect to the Spectacular, Amtrak exercises no prior review of advertising, and its contract with TDI expressly allows for political advertisements. Amtrak is currently displaying a political advertisement immediately in front of the Spectacular. And Amtrak allows retail book and magazine stores in Penn Station to sell and advertise political literature. Amtrak witnesses were not able to recall a single passenger complaint arising from these examples of political speech. In light of these practices, Penn Station is a designated public forum, and Amtrak's "policy" against political advertisements is unconstitutional. Moreover, even if Penn Station were a non-public forum, the restriction imposed is not reasonable in light of the purposes of the forum, for Amtrak has not demonstrated how a political advertisement would disrupt Penn Station's functioning.

Third, Amtrak's "policy" impermissibly gives preference to commercial over political speech, and impermissibly distinguishes between political advertisements in the Spectacular and elsewhere at Penn Station. The First Amendment forbids favoring commercial over political speech, and the First and Fifth Amendments require that any content distinctions on speech in different spaces must be justified by a compelling state interest.

Plaintiff's contract claims are predicated on the fact that TDI acts as Amtrak's agent in arranging contracts for the Spectacular. This is so notwithstanding TDI's claim that it is an independent contractor, because Amtrak retains approval over all material terms of the Spectacular contracts, including rates, duration, and advertising copy. Therefore, Amtrak is responsible for TDI's actions in negotiating and implementing the contract, and Mr. Lebron's contract is in effect with Amtrak. TDI is also liable on the contract because it failed to indicate to Mr. Lebron that it was acting as an agent for Amtrak.

Defendants' actions violate Mr. Lebron's rights under the contract in three ways.

First, Amtrak and TDI breached the contract with Mr. Lebron by exercising the right of ad copy approval unreasonably and in bad faith, particularly in light of TDI's prior representations that political advertisements were not a problem, Amtrak's own failure to enforce any policy against political speech anywhere else in Penn Station, and the delay in informing Mr. Lebron of its decision to reject the advertisement.

Second, Amtrak waived its right of approval in this case by failing to exercise that right in a timely fashion. Amtrak exercises a right of *prior* approval over advertising copy in the Spectacular, but in this case it waited virtually until the advertisement was to be put up before telling Mr. Lebron what it could have told him more than a year earlier, when its agent was informed that Mr. Lebron's advertisement would be political.

Third, Amtrak is equitably estopped from rejecting the contract for its political content because the TDI employee responsible for negotiating the contract, William Schwartz, misrepresented to Mr. Lebron that there was no bar against political advertisements, and Mr. Lebron then relied upon that representation to his detriment in creating his advertisement. Because TDI acts as Amtrak's agent in contracting for the Spectacular, Mr. Schwartz should have known of Amtrak's policy.

The Findings of Fact are organized as follows. Section I identifies the parties and physical space in dispute and details Mr. Lebron's contacts with TDI and the approval process for his advertisement. Section II sets forth the facts concerning Amtrak's and TDI's advertising standards and practices, with respect both to the Spectacular and to other advertising. Section III concerns Amtrak's related speech policies and practices at Penn station.

Sections IV through VII address facts relevant to state action. Section IV explains the creation of Amtrak and its control by the federal government. Section V concerns the United States' responsibility for Amtrak's acquisition of Penn Station and its continuing control over that property. Section VI sets forth the fiscal interrelationship between Amtrak and the United States. Section VII details the web of interrelations between Amtrak and other governmental entities at Penn station.

PROPOSED FINDINGS OF FACTS

I. *The Parties and Physical Space in Dispute*

The Parties

1. Plaintiff Michael Lebron ("Mr. Lebron") is a citizen of the State of New York and a resident of New York City. Lebron Dep. 6:3-5. [Admit]

2. Defendant Amtrak, a District of Columbia corporation with its principal place of busine[illegible] at 60 Massachusetts Avenue, N.E., Washington, D.C. 20002, was created by the Rail Passenger Service Act of 1970, as amended, 45 U.S.C. § 501 *et seq*. Amtrak Answer ¶ THIRD. **[Admit]**

3. Either in person or through its agents, Amtrak is transacting and has transacted business within New York including this district; regularly does and solicits business within New York including this district; and derives revenue from the operation of its railroad system, including New York's Pennsylvania Station ("Penn Station" or the "Station"),

through the Northeast Corridor (45 U.S.C. § 851(c)), including this state and district. Amtrak Answer ¶ FOURTH. **[Admit]**

4. Defendant TDI is a Delaware corporation that maintains its principal place of business at 275 Madison Avenue, New York, New York 10016. TDI ~~leases~~ sells advertising display space in many transportation stations and on billboards, ~~on behalf of their~~ pursuant to grants and licenses from owners, including Amtrak ~~and the Long Island Railroad~~ at Penn Station. TDI Answer ¶ 5; Schwartz Dep. 7:15-24, 11:25-12:22; Haut Dep. 30:24-31:6, 82:23-83:18.; Notaro Dep. 7:5-9:2, 83:4-95:23; PXX[1] 29; 53. **[OK]**

5. TDI has been known now or formerly as TDI, Winston Network and AMNI America. Haut Dep. 6:15-7:9. [Admit]

6. TDI is transacting and has transacted business within New York including this district; regularly does and solicits business within New York including this district; and, ~~as agent for Amtrak,~~ derives revenue in this state and district by contracting ~~as Amtrak's agent~~ to place advertising for the Spectacular. TDI Answer ¶ 6. Schwartz Dep. 10:14-18, 12:4-7, 16:16-20, 29:2-25, 37:20-38:11; PXX 2; 36. **[OK]**

Pennsylvania Station And The Penn Station Spectacular

7. Penn Station, a major hub of mass transportation in New York City, serves as a station on Amtrak's Northeast Corridor between Washington and Boston, and a terminus for both New Jersey Transit's and the Long Island Railroad's trains. DeAngelo Dep. at 16:6-9. The New York subway system abuts the station. DeAngelo Dep. 12:22-13:15. Amtrak owns Penn Station. DeAngelo Dep. 10:17-19. **[Admit]**

8. The Long Island Railroad ("LIRR") is owned and operated by the Metropolitan Transportation Authority ("MTA"). N.Y. Transp. Law § 219-c (McKinney 1975 & Supp. 1993). The MTA, New Jersey Transit ("NJT"), and the New York

[1] Plaintiff's exhibit(s) are referred to as "PX(X);" defendants' exhibit(s) as "DX(X)".

Transit Authority, which operates the New York subways, are ~~state entities~~ public authorities. N.Y. Pub. Auth. Law § 1263 (McKinney 1982 & Supp. 1993); N.J. Stat. Ann. § 27:25-4 (West 1992). **[OK]**

9. Penn Station occupies the area below street level in Manhattan that is bounded on the east and west by Seventh and Eighth Avenues and on the north and south by Thirty-fourth and Thirty-first Streets. It does not include the buildings above street level such as Madison Square Garden and Two Pennsylvania Plaza. DeAngelo Dep. 11:3-11; PXX 11 at Exhibit B, B-2 and 12; 62 at 5, ¶ 16. **[Admit]**

10. Penn Station comprises three levels. Amtrak owns all three levels, and leases space to the LIRR and NJT. The tracks, some of which are used jointly by Amtrak, the LIRR, and NJT, are all located on the lowest level. Through a leasing arrangement with Amtrak, the LIRR operates ~~most~~ a large portion of the middle or "A" level where its ticket windows are located and from which its trains are boarded, ~~although Amtrak retains responsibility for corridor and certain office space on the "A" level.~~ Amtrak ~~operates~~ controls the top or "B" level; ticket booths for both Amtrak and NJT are located on this level as well as an Amtrak ~~and MTA~~ information booth, and passengers for both Amtrak and the NJT board from the "B" level. DeAngelo Dep. 15:21-16:12, 184:3-187:3; Gallagher Dep. 32:8-33:24; PXX 1; 13; 14; 54. **[OK]**

11. Penn Station is a large, ~~multi-purpose~~ transportation facility. Its upper level ~~combines~~ contains the railroad station for Amtrak's ~~and NJT's~~ passengers ~~with the~~ including fast food restaurants and shops ~~that line~~ on the Seventh Avenue corridor ~~to give the feeling of an underground shopping mall~~ for the traveling public. The inventory of the station's ~~many~~ shops includes a bookstore, newsstands, ~~a jewelry store,~~ bakeries, novelty and souvenir shops, and drugstores, and Chemical Bank, ~~, an optician, clothing stores, a cutlery shop (Hoffritz), and a liquor store.~~ DeAngelo Dep. 298:7-9; PXX 84-85. **[OK]**

12. When approaching the Amtrak and NJT ticketing area from the east and before arriving at the information booth and main waiting area, one encounters a large, oval, high-ceilinged area known as the rotunda. Bourque Dep. 15:11-16:21; Schwartz Dep. 58:3-25; PXX 14 (marked by letter R); 54. Also located in the rotunda are escalators and a stairway which lead to the Station's main street level taxi stand. The rotunda may also be entered from the street through the corridor leading from Seventh Avenue. PXX 13, 54. The rotunda is a circulation area, and no seating is located in the rotunda. Gallagher Dep. 35:23-36:10; PX 54. **[OK]**

13. The Spectacular is a large, curved, back-lit advertising display space located approximately 20 feet above the floor of the rotunda, under which travelers walk as they enter and leave the main area of the Station. Schwartz Dep. 49:3-5; PXX 13; 50a; 50b; 50c; 54. The Spectacular measures approximately 103 feet long by 10 feet high. Its size and shape make it one of the largest advertising display spaces in New York City. Schwartz Dep. 49:6-19; Notaro Dep. 10:21-11:2; DX F at 9. **[Admit]**

14. The Spectacular is ~~normally~~ primarily seen ~~only~~ by those passing through the Rotunda. Lebron Dep. 84:18-85:6. It is not visible to passengers sitting in the Station's waiting area, standing at the Amtrak information booth, or waiting at the Amtrak ticket windows. Gallagher Dep. 32:11-33:2, 36:11-37:3; PXX 13; 54. **[OK]**

15. At least two advertising islands, or kiosks, measuring three feet on each side and seven feet high, are also located in the rotunda, on each side of the rotunda. Schwartz Dep. 41:3-19; Notaro Dep. 91:17-92:11; PXX 13; 54. **[OK]**

16. ~~The rectangular area in which the Amtrak ticket windows are located also has a very high ceiling. All four~~ Certain walls ~~of this space,~~ in the main waiting room, at a level above the normal ceiling level, include advertising ~~dioramas~~ spaces. Schwartz Dep. 36:17-21, 114:21-115:18; Notaro Dep. 86:11-25, 89:2-6; PXX 29; 53; 54. **[OK]**

Michael Lebron And His Work

17. Michael Lebron is an artist. His work, which combines visual and verbal elements, concentrates on political and social issues. Because a goal of his artistic work is to engage the public in these issues, he seeks to display his work in public places such as subways and transportation centers where he can reach a wide audience. Lebron Dep. 83:23-84:11; Lebron Aff. ¶ 2.

18. Mr. Lebron has exhibited his work in subways: in 1982, he exhibited posters concerning the arms race in the New York subway system; in 1984, his poster captioned "Tired of the Jellybean Republic?" was exhibited in the Washington, D.C. subway system ("Washington Metro"); and in 1987, the Washington Metro was the forum for a series of 25 works comprising drawings by different Nicaraguan children combined with photographs of the children and text describing the impact on them of the war in that country. Lebron Dep. 24:8-25:5, 65:13-20; Lebron Aff. ¶¶ 3-4; PX 44.

19. Mr. Lebron's 1984 work in the Washington Metro was the subject of a lawsuit, *Lebron* v. *Washington Area Metropolitan Area Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984), which held (then-Judge Bork writing for then-Judges Scalia and Starr) that the Washington Metropolitan Transit Authority's refusal to display the "Tired of the Jellybean Republic?" poster because of its content violated the First Amendment.

20. TDI, under a prior name, TDI-Winston Network, Inc., was a defendant in *Lebron* v. *Washington Area Metropolitan Area Transit Authority*, 749 F.2d 893, 895 n.3 (D.C. Cir. 1984). Haut Dep. 6:15-7:9.

21. Mr. Lebron's work has also been exhibited in galleries in this country and abroad, primarily in "alternative" or university galleries that are more likely to exhibit work focusing on social and political themes. Lebron Dep. 113:2-15; Lebron Aff. ¶ 5; PXX 63a; 63b.

"IS IT THE RIGHT'S BEER NOW?"

22. The art installation/advertisement at issue in this case is a montage of photographs and text that uses verbal and visual parody of a typical Coors Beer billboard advertisement to criticize the Coors family's use of the profits of the Adolph Coors Company, including the Coors Brewing Company, to support right-wing political groups, such as the Nicaraguan contrast. DXX F at 67-69; G.

23. The caption, "IS IT THE RIGHT'S BEER NOW?," parodies the Coors Beer advertising slogan, "IT'S THE RIGHT BEER NOW," and a visual device—a can of Coors beer with a comet tail shooting out behind it suggesting a projectile—parodies the Coors "silver bullet." DXX F at 66-69; G.

24. Text along the lower left edge of Mr. Lebron's work states: "This art installation is an advertisement paid for by Michael Lebron and produced by the ATW Communications Group." DX F at 67-69.

25. The genesis of Mr. Lebron's Penn Station work dates to spring 1987, when he spent three weeks in Nicaragua and witnessed a war, which the United States was then supporting with aid to the contrast. After this visit, Mr. Lebron saw Joseph Coors, Vice Chairman and Director of the Adolph Coors Company, testifying on May 21, 1987 before Congress in support of continued funding for the contrast and admitting that he had financed the purchase of an aircraft for the contrast. Through further investigation, Mr. Lebron learned that the Coors family, through the Coors Foundation, spends millions of dollars annually to support right-wing groups such as The National Forum Foundation, Morality in Media, The Heritage Foundation, and the Free Congress Foundation. Lebron Aff. ¶¶ 7, 9.

26. The realization of this connection inspired Mr. Lebron to create a public art installation that would bring to the attention of the public the connection between the profits earned from the sale of Coors beer and support of the war in

Nicaragua as well as other causes associated with conservative organizations. Lebron Aff. ¶ 7.

27. In order to finance his work, Mr. Lebron began saving the $100,000 it would take to complete the project from his income as a freelance advertising art director. Lebron Dep. 93:5-7; Lebron Aff. ¶ 7.

28. In July 1991, Mr. Lebron hired a professional photographer to help create the photographs for the piece, and in September 1991 they flew to Nicaragua to hire a theater company to stage the Nicaraguan street scene and to scout for a location. In October 1991, they returned to Nicaragua to shoot the imagery that comprises the right half of the piece. The remainder of the photography was completed in Los Angeles and Baltimore. Then, in New York beginning in June 1992, Mr. Lebron worked with a computer operator, who had scanned all the photographs into a computer, to assemble the images electronically into the final visual image. In total, over 100 people worked on the project. Lebron Dep. 170:10-176:24; Lebron Aff. ¶ 7.

29. Mr. Lebron's total expenses for the creation of the work through November 1992 were $42,812. Lebron Dep. 143:2-144:22; DX F at 20-65; PX 64.

Michael Lebron's Contacts With TDI

30. In August 1991, Mr. Lebron first spoke by telephone to an account executive at TDI, William Schwartz, who provided information about various spaces available in Grand Central Station, Penn Station, and the World Trade Center. Lebron Dep. 37:4-20; Schwartz Dep. 65:23-68:19.

31. In his initial August 1991 conversation, Mr. Lebron told Mr. Schwartz that he was not with an advertising agency, that he was an artist who installs his work on billboards in public locations, and that he was interested in buying space in New York. Lebron Dep. 36:17-37:3; Schwartz Dep. 69:4-18. Mr. Lebron said that he had done business with TDI in Washington, gave Mr. Schwartz the name of the TDI repre-

sentative on that matter, disclosed that his work was political and that his works tend to be controversial, and mentioned that the work he had done with TDI in Washington had been the subject of a lawsuit. Lebron Dep. 37:4-38:7; 56:15-58:6; 63:21-65:6.

32. During the August 1991 conversation, Mr. Schwartz told Mr. Lebron that there were no policy restrictions on advertising that differed from the ones that operate in Washington and that the usual rules regarding taste and obscenity applied, and Mr. Lebron made a contemporaneous note of that information. Lebron Dep. 157:11-20, 195:9-196:13; Schwartz Dep. 71:19-22; DX F at 1 ("usual restrictions on content"). Mr. Lebron discussed with Mr. Schwartz the possibility of leasing the Spectacular, and Mr. Schwartz did not tell Mr. Lebron that there was a policy against political advertising in the Spectacular or anywhere else in Penn Station. Lebron Dep. 196:14-197:4; Schwartz Dep. 70:12-71:18. Although he does not know when, Mr. Schwartz told Mr. Lebron that all advertising was subject to TDI's approval. Schwartz Dep. 73:19-75:19.

33. Also during the August 1991 telephone call, Mr. Schwartz told Mr. Lebron that rental of the Spectacular was approximately $16,000 monthly and that it had to be rented for a year.[2] Lebron Dep. 39:10-17; Schwartz Dep. 72:3-5. During that conversation and subsequent ones in approximately January and May 1992, Mr. Lebron explored the possibility of renting the Spectacular for a period of less than one year, possibly in conjunction with other people, and Mr. Schwartz prepared a draft contract for such an arrangement. Lebron Dep. 39:18-41:13, 44:22-46:23, 47:20-48:25; Schwartz Dep. 76:10-77:23; DX F at 5-6.

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[2] It was during the 1991 trip to Nicaragua in late September or October, when Mr. Lebron began designing the work, that he decided that the size and shape of the Spectacular were particularly well suited to the display of the work as he envisioned it. Accordingly, the work was created specifically for the Spectacular. The unique dimensions of the site are such that the work is not suitable for display at any other location. Lebron Dep. 43:8-44:18; Lebron Aff. ¶ 9.

34. In May 1992, Mr. Lebron inquired of Mr. Schwartz about leasing the Spectacular by himself for two months. Lebron Dep. 46:11-47:2; Schwartz Dep. 79:19-80:10. After telephone calls, letters and an initial draft contract in July 1992, Messrs. Lebron and Schwartz negotiated terms for Mr. Lebron to rent the Spectacular by himself for January and February 1993 for $18,500 per month. Mr. Schwartz sent Mr. Lebron a contract dated July 31, 1992, reflecting that arrangement. Lebron Dep. 47:3-20, 49:2-51:12; Schwartz Dep. 82:4-15, 86:20-87:11, 87:24-88:5; DXX F at 10-12, 14; H.

35. Mr. Lebron signed the contract on August 19, 1992, and returned it to Mr. Schwartz. Shortly after that, Mr. Schwartz clarified that a final decision on the contract must await a decision by the advertiser then leasing the Spectacular, Abraham & Straus ("A&S"), about whether it intended to renew its lease. Lebron Dep. 51:10-22, 52:2-7, 53:9-17; Schwartz Dep. 82:6-15, 85:9-23; DX F at 13.

36. In August 1992, in response to an inquiry from Mr. Schwartz about the content of the work, Mr. Lebron reiterated that his work is political; that it looks like advertising and at first glance without reading it, people often think it is advertising; but, in a reference to the performance artist Karen Finley, he said that he was not the kind of artist who would stand naked in Penn Station pouring chocolate over himself in order to make a statement about sexual harassment. Mr. Schwartz did not then tell Mr. Lebron that there was a policy against political advertising in the Penn Station Spectacular. Lebron Dep. 53:20-21, 54:13-18, 55:4-18; 197:15-24; Schwartz Dep. 101:20-102:8. Lebron aff ¶ 11

37. Mr. Lebron told Mr. Schwartz that his advertisement was political, but sought to keep confidential the specific content of the work he was creating. Lebron Dep. 197:7-14. He did so as a matter of course with everyone he worked with for several reasons: to ensure that no one would misinterpret an unfinished work; to avoid disclosure of the specific content of the work until it was ready to be displayed; and to minimize association of his artistic work with the clients of the adver-

tising agencies that employ him. Lebron Dep. 53:20-54:18, 95:15-25, 96:23-97:8.

38. In response to an October 26, 1992 letter from Mr. Lebron, Mr. Schwartz informed Mr. Lebron in the first week of November 1992 that it was likely that even if A&S renewed, TDI would probably rent the Spectacular to Mr. Lebron before the A&S renewal period; Mr. Schwartz promised to confirm that information in a week. Lebron Dep. 60:2-61:5, 166:20-167:4; DX F at 16.

39. A week came and went without confirmation from TDI. During Thanksgiving week, Mr. Lebron visited Mr. Schwartz at TDI's offices to inquire about the status of his work. During his twenty-minute visit, he showed samples of his work, all of which were political, to Mr. Schwartz. When Mr. Schwartz asked which of the works Mr. Lebron intended to display in the Spectacular, Mr. Lebron explained that he was designing an original work. When the two parted, Mr. Schwartz said that his supervisor would be back in the office with the contract after Thanksgiving. Lebron Dep. 6:24-10:15, 9:5-8, 11:11-12:10, 15:12-25, 16:13-23; 22:25-23:21, 26:2-27:18, 29:25-30:18, 61:6-18; Schwartz Dep. 98:15-99:11; DXX A-E.

40. Mr. Schwartz remembers that, during Mr. Lebron's visit to his office, Mr. Lebron said that he was an artist and that his work made people think. Moreover, Mr. Schwartz understood that Mr. Lebron's work was not commercial, and he remembers seeing one of the works that Mr. Lebron said he showed him during the visit. Schwartz Dep. 99:15-100:20, 101:11-102:3; Lebron Dep. 10:12-11:4, 12:6-10.

41. At no time during Mr. Lebron's 1992 Thanksgiving visit, even after seeing samples of Mr. Lebron's work, did Mr. Schwartz tell Mr. Lebron that there was a policy against political advertising in the Penn Station Spectacular. Lebron Dep. 197:25-198:21; Schwartz Dep. 102:4-8.

42. On November 30, 1992, Mr. Schwartz called Mr. Lebron to tell him that TDI had signed his contract, which

Mr. Lebron picked up the next day at TDI's offices. Lebron Dep. 62:2-12, 63:13-17, 167:25-169:2; Schwartz Dep. 91:12-22; DX F at 17, 18.

43. The contract between TDI and Mr. Lebron is the form contract that TDI uses for all advertising intended to be displayed in railroad stations. Haut Dep. 28:18-24; *see, e.g.*, DX H.

44. The contract between TDI and Mr. Lebron was signed by Chris Culver for TDI. Nowhere does the contract state that TDI is signing as the agent for Amtrak, nor does it state that the contract is subject to final approval by Amtrak. The contract states only that "[a]ll advertising copy is subject to approval of TDI and the Transportation Facility concerned as to character, text, illustration, design and operation." Notaro Dep. 72:6-74:10; DX 52; DX H at III.a.

45. On December 2, 1992, Mr. Lebron provided TDI with a color photocopy of the visual portion of the work and, separately, a copy of the text for review. Lebron Dep. 62:13-63:20; Schwartz Dep. 95:21-25.

46. On December 3, 1992, Mr. Schwartz told Mr. Lebron that when he first looked at the work, it seemed like an ordinary commercial advertisement for a product, but, when he read it, he realized it was "very heavy." In response to Mr. Lebron's question whether there was likely to be a significant problem with approval of the work, Mr. Schwartz said he did not know because it was not his job. Lebron Dep. 93:8-95:3; Schwartz Dep. 110:21-112:8.

47. At no time during the December 3 conversation did Mr. Schwartz tell Mr. Lebron that there was a policy against political advertising in Penn Station. Lebron Dep. 63:21-65:6; 198:22-199:9.

48. On December 4, 1992, Chris Culver, TDI's then-New York Sales Manager, told Mr. Lebron that the Amtrak approval process would take a long time, and he offered Mr. Lebron a large number of alternative billboard locations on

which to display the work Mr. Lebron had submitted on December 2, 1992 for approval. Lebron Dep. 199:10-200:15.

The Approval Process for Mr. Lebron's Work

49. Although Mr. Lebron delivered his work to TDI for review on December 2, TDI's general counsel, Tina Haut, did not send it to Amtrak until December 7, 1992. The photocopy of the work was addressed to Bruce Bourque, the Project Director for Real Estate Development, Penn Station, New York, who makes the initial determination about whether to approve material submitted for the Spectacular. Haut Dep. 60:14-19, 67:11-68:9; Bourque Dep. 107:13-108:14; DeAngelo Dep. 41:11-47:24; PX 5.

50. Mr. Lebron's work was received at Amtrak on December 8 and Mr. Bourque first saw it on December 9. Although Mr. Bourque thought that the work was political and therefore not qualified to be displayed in the Spectacular, he did not inform Ms. Haut or Mr. Lebron that the work violated an Amtrak policy against political advertising. Bourque Dep. 108:14-24, 115:23-25, 120:7-14, 122:16-123:17; Haut Dep. 20:23-21:7.

51. Mr. Bourque took no action regarding Mr. Lebron's work until December 14 or 15, when he showed it to Maria Green in Amtrak's Legal Department. Bourque Dep. 108:15-18, 110:4-10, 112:11-25, 117:3-11. He took that step because he had received from Ms. Haut letters from Mr. Lebron's counsel. *Id.* On December 14 or 15, Mr. Bourque still thought Mr. Lebron's work was political (Bourque Dep. 120:15-20), but he failed to notify TDI or Mr. Lebron, even though Ms. Haut telephoned him a number of times pressing for a prompt response regarding approval. Bourque Dep. 110:11-111:9; Haut Dep. 72:16-74:6. (Ms. Haut had received several communications from Mr. Lebron's counsel asking for a decision before Mr. Lebron would be required to spend the $20,000 required to make the transparency TDI requires for the Spectacular before the January 1, 1993 beginning of his contract date. Haut Dep. 63:18-66:11; PXX 24; 25.)

52. Mr. Lebron's application was discussed during a dinner meeting Mr. Bourque had with Anthony DeAngelo, Ms. Green, and Don Pross, Mr. Bourque's supervisor, on December 17, 1992, in New York. Mr. DeAngelo, Amtrak's Vice President for Real Estate and Operations Development, makes all final decisions approving an advertisement for the Spectacular. DeAngelo Dep. 41:11-42:17, 47:19-24, 120:4-121:1; Bourque Dep. 7:16-18; 118:14-120:4.

53. Although Mr. Bourque believes that he showed the pictorial copy to Mr. DeAngelo, Mr. DeAngelo does not believe he saw it before he made his decision; he thinks that Mr. Bourque described it to him, mentioning the right-wing organizations Mr. Lebron identifies in his work. Bourque Dep. 119:19-120:4, 121:18-122:4; DeAngelo Dep. 111:17-112:6, 112:19-25, 113:8-20, 114:20-115:20.

54. On December 17, 1992, Mr. DeAngelo disapproved Mr. Lebron's work for the Spectacular because it was political. DeAngelo Dep. 112:10-18, 114:14-19, 121:20-122; *see also* Bourque Dep. 121:18-122:15.

55. Ms. Green of Amtrak's Legal Department drafted Amtrak's letter to TDI stating the basis for Amtrak's disapproval. Although Mr. DeAngelo now says the reason for rejecting Mr. Lebron's advertisement was that it was not "commercial," Mr. Bourque recalls that Mr. DeAngelo rejected the ad because it was political, and Mr. Green's letter to TDI stated that Amtrak would not accept Mr. Lebron's advertising because "Amtrak's policy is that it will not allow political advertising on the spectacular advertising sign." PX 6. Because Mr. DeAngelo was on vacation, Mr. Turpin signed the letter on behalf of Mr. DeAngelo. Amtrak mailed that December 23, 1993 letter to TDI, where it was not received until January 4, 1993. A copy of it was faxed to TDI on December 28 or 29, 1992. Bourque Dep. 122:6-8; 125:4-135:10; DeAngelo Dep. 114:14-17; 121:3-10; Haut Dep. 68:12-69:17; PX 6.

56. Although the decision to disapprove Mr. Lebron's advertisement was made on December 17, no one from

Amtrak notified TDI until December 23, 1992, when Ms. Haut was notified by telephone. Despite undertaking on December 22 "to get an answer from AMTRAK as soon as possible," Ms. Haut decided not to notify Mr. Lebron or his counsel of Amtrak's decision until she had received a letter from Amtrak. Bourque Dep. 125:4-135:10; Haut Dep. 70:11-19, 72:8-15; PX 26.

57. On December 28 and 29, 1992, Mr. Lebron's counsel made final efforts to secure from TDI a response about the status of Mr. Lebron's work before the beginning of the January 1 contract period. Haut Dep. 66:5-67:10; PXX 27, 28.

58. It was not until December 29, 1992, after Amtrak's general counsel was informed of Mr. Lebron's intent to sue, that TDI notified Mr. Lebron's counsel of Amtrak's decision. Haut Dep. 66:14-19; Phares Aff. ¶ 14; PX 28.

II. *Amtrak Advertising Standards and Practices*

59. Amtrak's Board of Directors ~~has direct authority to~~ could approve or disapprove Amtrak's advertising policies. ~~and has delegated this authority to its Finance Committee, which has delegated it to its Vice President for Real Estate and Operations Development.~~ DeAngelo Dep. 24:15-25:8, 38:10-21. ~~As a result,~~ Amtrak's Real Estate Department ~~(and specifically the Real Estate Development and Marketing section),~~ is responsible for third-party advertising located on Amtrak property. Delaney Dep. 14:9-15:13. **[OK]**

60. In February 1991, Amtrak's Board of Directors ~~specifically~~ authorized Amtrak to enter into licensing arrangements with TDI to sell Amtrak advertising space in Amtrak's stations and on Amtrak's outdoor advertising locations. The Board authorized the Vice President for Real Estate and Operations Development to sign all necessary documents to further all such arrangements. Delaney Dep. 81:10-24; DeAngelo Dep. 24:15-25:8; PXX 2; 65 at 7-8, 127. **[Admit]**

61. Pursuant to this authorization, Amtrak has entered into ~~three~~ two different licensing arrangements with TDI: one covering all station advertising, ~~other than the Spectacular;~~ including the Spectacular (except its price terms) and one covering all outdoor advertising~~;~~. ~~and a third covering the Spectacular itself.~~ On March 15, 1991, Amtrak and TDI signed two ~~general~~ contracts governing the ~~first~~ two licensing arrangements. PXX 2, 27. ~~However, neither of these contracts governs then Spectacular; they neither refer to (or describe) the Spectacular nor include the terms by which the Spectacular is leased.~~ Delaney Dep. 59:7-60:21; Haut Dep. 12:21-13:17; DeAngelo Dep. 82:23-83:11 PXX 2; 127.[3] **[OK]**

62. The ~~leasing~~ arrangement concerning the Spectacular is ~~instead~~ governed by the 1991 in door agreement (PX 2), past practice and a series of letter agreements. Under this ~~agreement, also authorized by the Board, all terms including~~ arrangement, the monthly rate, duration, and advertising content, ~~even~~ and cancellation—of any contract that TDI arranges for the Spectacular must be approved by Amtrak. ~~TDI~~ Amtrak receives a percentage of the net receipts, an arrangement that was established by past agreements and separate letter agreements between Amtrak and TDI and their predecessors. DeAngelo Dep. 223:20-224:16, 239:3-13, 240:12-242:6, 243:10-19; Haut Dep. 13:12-17; Notaro Dep. 67:21-68:20, 70:12-71:5, 72:6-73:5; PXX 20; 34-37; 46, 52. **[OK]**

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[3] ~~From the outset of this litigation, defendants' counsel have consistently misrepresented to plaintiff's counsel that the March 1991 Station Advertising agreement (PX 2) covers the Spectacular. They did so at several depositions, and in a January 14, 1993 letter from Richard Slattery to Gloria Phares. PX 62 at 4, ¶ 8. However, witnesses for both TDI and Amtrak have stated that the March 1991 Station Advertising Agreement does not cover the Spectacular. In fact, the Spectacular is not included in the description of advertising spaces covered by the Agreement, which include only "posters, islands, TDI clocks, and dioramas." PX 2 at 1. Moreover, the financial terms of the Agreement do not include those for the Spectacular. The Agreement establishes two fixed percentages that TDI is to pay Amtrak out of its net receipts on the different displays covered by the Agreement, but these amounts do not reflect the 65% agreement that applies only to the Spectacular. *Id.* at 2; DeAngelo Dep. 227:9-14; 235:3-13; 237:12-238:21.~~

63. For example, all the contracts for the A&S advertisements that have been in the Spectacular since 1987 state on their face that the contract and copy are subject to final approval by Amtrak. In 1987, the Amtrak Board of Directors ~~specifically approved~~ authorized the first of the A&S contracts for the Spectacular. ~~The Amtrak document that recommended approving the contracts and the Board Minutes approving the contracts refer to them as contracts between Amtrak and A&S Department Stores, Inc.~~ DeAngelo Dep. 242:13-247:22; PXX 37; 52; 58-60; 106-109. **[OK]**

Amtrak's Advertising Standards

64. According to Anthony DeAngelo, Amtrak Vice President for Real Estate and Operations Development, Amtrak applies the same advertising content standards to the Spectacular as it does to all other advertising, including in-station advertising (wall posters, dioramas, free-standing "islands" or kiosks) and billboards along Amtrak's right of way ("non-Spectacular advertising"). DeAngelo Dep. 32:6-33:18, 50:24-51:3; 70:9-71:6; Delaney Dep. 39:8-40:6; Bourque Dep. 60:21-61:3. **[Admit]**

65. Mr. DeAngelo~~, who~~ has ultimate approval authority for advertisements~~,~~. ~~stated that Amtrak's policy prohibits advertisements for (i) competitors (such as airlines and buses), (ii) pornographic advertisements, and (iii) advertisements that are "objectionable to our riding public and others associated with us including political and other types of potentially controversial matters." DeAngelo Dep. 8:3-10, 30:13-18.~~ The policy is also intended inpart, to avoid having Amtrak's passengers "view advertisements on the Spectacular that they may deem offensive or divisive." DeAngelo Aff. § 4. **[see pp. 30-33, 42, 94 of DeAngelo Depo]**

66. ~~With the exception of the prohibition on competitor's advertising, however, there is no written version of this policy or its justifications. DeAngelo Dep. 30:22-31:20, 59:20-60:6, 92:2-21; *see* PX 2, ¶ 7(c) (barring competitors' ads).~~ **[No; See PX 4, PX 18]**

67. ~~There is no written policy whatsoever regarding advertising standards for the Spectacular. DeAngelo Dep. 30:22-31:20.~~ **[PX 4, PX 18]**

68. ~~"Objectionable" is not defined or illustrated in writing in any document governing TDI's leasing of Amtrak's advertising space.~~ DeAngelo Dep. 44:9-47:24, 59:20-60:6. Mr. DeAngelo defined "objectionable" as follows:

> Issues that would cause our passengers to be concerned and upset to write letters to us, to talk about it amongst themselves and things which they would find inappropriate for Amtrak to be a part of.

DeAngelo Dep. 61:5-12. **[PX4, PX 18; OK]**

69. William P. Delaney, a project manager in Amtrak's Real Estate Department who was Amtrak's principal negotiator with respect to the 1991 Agreement (Delaney Dep. 6:7-9, 21:7-22:18), ~~and who reviews copy for both in-station and outdoor advertising~~ (Delaney Dep. 37:7-38:10), had never ~~even *heard*~~ learned of ~~an~~ Amtrak policy against political or any other advertising (other than to prohibit competitive advertising)[4] (Delaney Dep. 16:15-17:16, 31:3-7, 39:15-23, 49:18-50:~~4~~ 53:14-16).[5] **[OK]**

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[4] ~~Amtrak apparently does not even enforce its written policies consistently. The 1991 contracts with TDI prohibit the display of advertisements of Amtrak's competitors, and Amtrak has ordered airline advertisements removed in the past. However, TDI's billings reflect that it has placed advertisements in Penn Station for airlines, such as American and Continental. DeAngelo Dep. 71:22-72:11; Delaney Dep. 43:11-45:8; PXX 2, ¶ 7(e); 29 at 40, 43, 46-47, 55, 62-63, 68, 71, 77-78; 53; 127.~~

[5] ~~Plaintiff's evidence on this score is based solely upon Mr. Delaney's deposition testimony. At the commencement of this case, plaintiff's counsel submitted an affidavit from an associate at Weil, Gotshal & Manges, reflecting the substance of a conversation he had with Mr. Delaney on this subject. A question has been raised by opposing counsel as to whether the associate should have initiated that call, and conducted it in the manner he did. While not conceding any ethical impropriety, Weil, Gotshal & Manges does not condone his conduct, and no reliance has been placed upon the information gleaned during that conversation. In any event, the substance of that call has been amply confirmed by Mr. Delaney in his subsequent deposition testimony.~~

70. ~~Mr. Delaney testified that, to him, while "objectionable" means "incendiary," "not in good taste," and "inflammatory," (Delaney Dep. 25:25-26:25, 38:18-39:6), he is not aware of any Amtrak policy that would prohibit any such advertisements (Delaney Dep. 31:3-34:14). Moreover, he has never discussed these standards with anyone at either Amtrak or TDI, and the only criteria he uses in applying these standards are his own "internal criteria." Delaney Dep. 6:5-20, 29:17-30:5, 36:5-23, 86:4-25. Finally, he stated that he was not aware of any Amtrak written materials relating to any criteria for assessing advertising. Delaney Dep. 39:15-23.~~ **[Irrelevant—See Amtrak Finding of Fact para. 28]**

71. ~~While~~ tTwo Amtrak officials contend that a 1980 contract between Amtrak and TDI is ~~the source~~ evidence of its policy against political advertising (DeAngelo Dep. 31:2-20; Bourque Dep. 61:2-20, 65:21-66:7).~~;~~ [6] tThat contract was cancelled and superseded by a 1985 contract between Amtrak and WNI (TDI's-predecessor), which ~~deleted~~ did not contain any specific reference to political advertising (PX 3, ¶ 7). The 1985 agreement was, in turn, superseded and cancelled by the 1991 Agreement, which also contained no specific reference to political advertising. PX 2, ¶¶ 30-31. **[OK]**

72. ~~Moreover, despite Amtrak's claim that the superseded 1980 contract is the source of its policy against political advertising,~~ Bruce Bourque, a project director in Amtrak's Real Estate Development Department ~~who~~ is responsible for reviewing proposals for Spectacular advertisements~~;~~. [OK] ~~has not looked at the 1980 contract since shortly after starting with Amtrak in 1984 (*i.e.*, before the 1980 contract was~~

[6] The 1980 contract (PX 4, ¶ 27) precluded

> any advertising that, in [Amtrak's] judgment, may be unlawful, immoral, improper or offensive to good taste, or be in competition directly or indirectly with the transportation conducted by [Amtrak] or its affiliated companies; or involve political or other views which could result in dissension or involve [Amtrak] in dissension, complaints or controversy with its patrons or the public . . .

~~superseded), and Mr. Delaney, the principal negotiator of the 1991 agreements, had never even *seen* the 1980 contract prior to his deposition.~~ Bourque Dep. 62:5-25; Delaney Dep. 68:23-69:4, 71:22-23, 92:18-93:4. **[Irrelevant See Amtrak Finding para. 28]**

73. Furthermore, Mr. DeAngelo has not informed members of his staff—who have general responsibilities for particular stations, including observing the advertising in those stations—of Amtrak's advertising standards or of any policy against political advertising. Rather, the staff is simply expected to use its "common sense" in evaluating whether the advertisements are "contributing to the overall effectiveness" of the station. DeAngelo Dep. 41:1-42:17, 45:12-46:4, 74:7-75:12. **[No]**

74. ~~Apart from~~ Prior to the present case, Amtrak has never ~~rejected or ordered any~~ been asked to display a political advertisement ~~removed either~~ and no such advertisement has been displayed on the Spectacular or anywhere else.~~—because of its "political" content.~~ DeAngelo Dep. 53:19-55:7, 72:2-15; Delaney Dep. 32:11-34:25, 47:9-48:10; Bourque Dep. 72:19-23. ~~Nor could~~ Mr. DeAngelo could not recall ever receiving an Objection from the public regarding an advertisement. DeAngelo Dep. 79:18-80:7. **[OK]**

75. ~~Amtrak's deponents were unable to provide a coherent, consistent definition of "political" advertising. Mr. DeAngelo initially defined "political" only as "mostly non-commercial" (DeAngelo Dep. 33:19-20), but stated that advertisements that do not sell products are only "potentially political" (DeAngelo Dep. 35:4-17). He could not say whether an advertisement such as a Benetton advertisement depicting an oil-laden duck that promotes a product or service while also communicating another message would be considered political (DeAngelo Dep. 34:4-23). He subsequently stated that any non-commercial advertisement would be against Amtrak policy, but acknowledged that this statement was inconsistent with Amtrak's written contracts with TDI, which allow for the display of both public service announcements and advertising~~

~~by non-profit organizations. DeAngelo Dep. 286:4-291:19; PX 2, ¶ 32~~. **[*No*; See Deposition and objections therein.; No]**

76. ~~To Mr. Delaney, "political" advertising meant campaign advertising. He could not say whether any other advertising geared toward public issues would be political, stating that he would have to see an example in order to make a judgment. Delaney Dep. 50:15-51:17~~. **[*No*; Irrelevant; also Amtrak Finding para. 28]**

77. Mr. Bourque ~~admitted~~ stated that ~~he did not know what political advertising is and that~~ he had not previously been presented with a political advertisement since joining Amtrak in 1984. Bourque Dep. 71:3-4, 72:21-23, 73:16-22, 6:19-21. ~~Mr. Bourque also had not thought about whether all advertisements that are not selling a product or service are political.~~ Bourque Dep. 102:14-18.

78. ~~Mr. Bourque maintained that a Timberland advertisement containing a reference to Native Americans was "political" even though it was also intended to sell a product (footwear) (Bourque Dep. 99:7-100:11; PX 41); that Smartfood advertisements for popcorn poking fun at politicians and royalty had "a large political component" and "probably would be considered political" (Bourque Dep. 96:22-97:24; PX 40); that a Benetton advertisement showing leaves soaked with oil was political (Bourque Dep. 90:9-12; PX 39); and that advertisements for *Time* magazine featuring photographs of currents events with related rhetorical questions—e.g., "What Happens To You If He Goes?" were political because even though they sold a product, they had a "political message."~~ Bourque Dep. 94:1-95:3; PX 39. **[*Irrelevant*; See Deposition Obj.; Bourques Depo pp. 162-193]**

79. ~~Mr. DeAngelo explained that Amtrak's rationale for not displaying a non-commercial advertisement, such as a political advertisement, even if the advertiser were willing to pay Amtrak's rates for the Spectacular, relates to a concern for a loss of revenue. Specifically, Mr. DeAngelo disapproved Mr.~~

~~Lebron's work in order to avoid the loss of passengers who might be so antagonized by the work that they would refuse to ride the railroad.~~ DeAngelo Dep. 294:3-295:14, 295:22-297:20, 314:7-316:11; DeAngelo Decl. ¶ 4. **[See DeAngelo Depos]**

Spectacular Advertising

80. ~~Although not set forth in any written agreement between TDI and Amtrak,~~ ~~t~~The practice of the parties has been to require prior approval of the content of Penn Station advertising by Amtrak only for the Spectacular. DeAngelo Dep. 57:18-58:8, 42:21-23, 70:20-71:6; Haut Dep. 16:22-17:4. **[OK]**

81. In the case of Spectacular advertisements, the copy and the artwork are forwarded from TDI—usually by Vincent Notaro or Richard Ament—to Mr. Bourque. He reviews it and presents it to Mr. DeAngelo along with his comments, which are usually verbal rather than written. Bourque Dep. 53:2-17; Haut Dep. 22:2-12, 60:2-6; Notaro Dep. 19:3-20:16; PXX 46; 48; 49; 51. **[Admit]**

82. TDI is~~, or should be,~~ aware of the fact that, over the years, Amtrak ~~has had a history of delay~~ normally takes atleast 30 days in deciding whether to approve proposed advertisements for the Spectacular. Notaro Dep. 26:6-34:22, 35:22-45:7, 50:21-51:4, 56:6-60:21, 64:10-67:5; PXX 34; 38; 46; 48; 51. **[OK]**

83. Mr. DeAngelo has final authority to approve advertisements for the Spectacular. DeAngelo Dep. 37:17-21. He communicates his decision—not always in written form—to a member of his staff, who then communicates it to TDI. DeAngelo Dep. 49:17-20. Amtrak does not always maintains no written records of this process. Delaney Dep. 42:24-44:8. **[OK]**

Non-Spectacular Advertising

84. ~~Although Mr. DeAngelo states that Amtrak's policy concerning advertising content is applied consistently to all advertising on Amtrak property,~~ Amtrak ~~in fact~~ does not exercise prior content review for any advertising other than the Spectacular. DeAngelo Dep. 48:11-23, 72:19-23, 73:9-14, 51:4-7; Haut Dep. 23:20-24:2. **[OK]**

85. Tina Haut, General Counsel of TDI, testified that, at least since she arrived in 1985, TDI had not submitted *any* non-Spectacular advertisements to Amtrak for review. Haut Dep. 24:23-25:5, 25:22-26:3. **[OK]**

86. Non-Spectacular advertising is ~~at best~~ seen ~~reviewed~~ by Amtrak only after it is in place~~,~~. ~~and often only if someone were to complain about it.~~ DeAngelo Dep. 51:8-52:7. ~~However, a~~No Amtrak employee could recall ~~a single~~ an instance in which Amtrak has received a complaint from the public concerning any advertisement, nor any instance in which Amtrak decided to remove an advertisement because it was objectionable (apart from the airline ads identified by Amtrak staff as inconsistent with the policy against competitors' ads). DeAngelo Dep. 71:22-72:15; Delaney Dep. 55:20-56:24. **[OK]**

87. ~~Mr. Bourque did not know what standards are applied to non-Spectacular advertisements (Bourque Dep. 68:8-12, 74:18-20), and, as stated above, Mr. Delaney used his own internal criteria to assess advertising.~~ Delaney Dep. 36:5-23.

88. ~~Mr. DeAngelo claims that TDI guidelines, which he concedes are inconsistent with and less restrictive than Amtrak's, do not control or have any effect on advertising at Penn Station. DeAngelo Dep. 287:12-291:19, 318:6-18; PX 15, ¶ 13. But as Amtrak does not review any non-Spectacular advertisements prior to their display, the TDI advertising standards are the *de facto* standards applicable to such advertisements. TDI's standards are "[b]asically community standards." Haut Dep. 25:10. TDI's "Commercial Advertising Guidelines" (dated January 1990) provide that "[a]ll advertising placed by TDI should reflect a high level of good taste, decency and community standards in both copy and art." PX 15, ¶ 1. They explicitly permit political and other ideological advertising. PX 15, ¶ 13.~~ **[Irrelevant + See DeAngelo Depo Object.; No Foundation]**

TDI's Advertising Standards and Relationship to Amtrak

89. ~~Prior to the discussions concerning Mr. Lebron's advertisement, Ms. Haut had never discussed the standards for approval of advertising with anyone at Amtrak and was not aware of any Amtrak advertising policy or prohibition on political advertising. Haut Dep. 19:3-15. Even with respect to Mr. Lebron's advertisement, Ms. Haut was not told anything about Amtrak's approval process other than that it would take time. She was never told, even though she telephoned Mr. Bourque several times regarding the status of the application, that Amtrak had any policy that would preclude the advertisement. Haut Dep. 20:13-21-7.~~ **[See Depo pp. 19-21 for Testim.]**

90. ~~Mr. DeAngelo was unaware that TDI had its own advertising standards. DeAngelo Dep. 317:19-318:5. He thinks he recalls having discussions with someone from TDI "in the distant past," and they "may well have discussed a ban on political advertising" but he testified that he might not have had such a discussion.~~ DeAngelo Dep. 88:15-89:25. **[See *Depo.; No;* Also *Irrelevant*]**

91. Vincent Notaro, Senior Vice President for Franchise Development at TDI who is responsible for the fabrication and installation of Spectacular displays and who for many years has forwarded proposed copy to Amtrak, testified that he has never discussed advertising standards with Mr. Bourque. Notaro Dep. 6:21-7:14, 9:9-10:7, 11:3-11:12, 53:17-24. [OK]

92. Far from prohibiting political advertisements, TDI's commercial advertising guidelines accept such advertisements as commercial advertisements, and charge full commercial rates for them. Haut Dep. 46:17-21; PX 15, ¶ 13 (full rate

card charged for any advertisement "promoting or criticizing a political candidate or party, or any statement that tries to influence, provoke, preach, theorize, criticize, condemn or condone any government policy, political philosophy, specific religion, or ideology . . . ."). **[*Irrelev*; See DeAngelo Dep 287-291, 318]**

93. Mr. Lebron's advertisement was acceptable under the TDI guidelines as reflected by the offer from TDI's Mr. Culver to display Mr. Lebron's advertising in other TDI locations. *See supra* ¶ 48. **[Irrelev.]**

Advertising Practices

94. The 1991 Station Advertising Agreement permits TDI to display "public service advertising" and advertising by non-profit organizations in Amtrak stations, including Penn Station. PX 2, ¶ 32.

95. TDI defines public service advertising as "non-commercial, non-partisan" advertisements not designed to influence elections or legislation. PX 16, ¶ 1. "Non-commercial" is defined as an advertisement that does not, as its primary purpose, promote a product for sale or a service for hire. PX 16, ¶ 2.

96. While Mr. DeAngelo was not aware of any public service advertisements being displayed, TDI in fact does place such advertising in Amtrak stations. DeAngelo Dep. 96:10-12; Haut Dep. 43:23-44:17; PX 2, § 32(c).

97. Public service advertisements displayed in Penn Station by TDI in the past included messages concerning the homeless, the environment, drunk driving (for the group Mothers Against Drunk Driving), AIDS, and race relations, none of which Amtrak ordered removed. Haut Dep. 37:10-19; 44:5-7.

98. Amtrak and TDI have also permitted and continue to permit the display of paid political advertisements in Penn Station. For example, advertisements for *The Plain Truth*, a religious magazine on political and social issues published by

The Worldwide Church of God, have been displayed immediately in front of the Spectacular since at least 1988. PXX 29 at 43, 52, 59, 68, 77; 53. These advertisements do not sell a product or service. The current advertisement describes the magazine as discussing "world trends" and "social issues," and pictures a magazine cover with the headlines "A United Europe: The Next Superpower?," and "Say No to Adultery." PXX 21a; 21b; 21c. Amtrak and TDI also have permitted advertisements for news magazines such as *Time*, *The Economist*, and *Newsweek*, which discuss political issues, and political satire magazines like *Spy*. Finally, Amtrak and TDI have permitted advertisements for airlines such as American and Continental, even though barred by ¶ 7(c) of the 1991 Agreement. Notaro Dep. 93:10-97:2; PXX 29; 53; 55a; 55b; 55c.

III. *Related Policies and Practices Respecting Political Expression in Penn Station*

99. Amtrak treats Penn Station as a public forum, permitting political speech not only by advertisers, but also by retail store owners and the general public. For example, Amtrak has written guidelines, entitled "Amtrak Regulations For Exercise Of Certain Free Speech Rights In Pennsylvania Station, NYC," which permit, on a content-neutral basis, distribution of literature, display of placards and engaging of passersby in conversation about political, religious and other issues. PX 10.

100. Pursuant to these guidelines, Amtrak has permitted a variety of individuals and organizations, such as The Alliance Committee for the Homeless (PX 33/10), United Homeless Organization (PX 33/23), Our House at St. Peter's (PX 33/25), and Animal Protection/SUPPRESS (PX 33/17) to provide literature, engage in discussions and solicit funds within Penn Station. PXX 10, ¶ 15; 31; 32.

101. The only time Amtrak has ever refused an applicant's request for a permit to exercise free speech rights in Penn Station has been: i) when the applicant has sought to exercise

such rights initially during a time of peak travel through Penn Station (*i.e.*, Thanksgiving) (Gallagher Dep. 146:22-149:14; PX 33/34); or ii) when the applicant has in reality sought to sell products rather <u>than</u> engage in more traditional forms of free speech expression (Gallagher Dep. 154:12-156:13; PX 33/32).

102. The advertising and free speech policies merge at certain points, for example in the case of The Worldwide Church of God, a fundamentalist Christian organization. That organization advertises on a kiosk at Penn Station (*see* PXX 21a; 21b; 21c), and distributes its monthly religious magazine, *The Plain Truth*, free of charge through its advertising displays (PXX 21a; 21b; 21c; 22). *The Plain Truth* contains articles discussing such topics as religion, social issues including homosexuality and gambling, and political issues such as the Arab-Israeli conflict from a Christian perspective, in addition to providing information about the Worldwide Church of God. PXX 22; 80.

103. Amtrak leases space to numerous retail establishments in Penn Station, including book stores and newsstands which sell books and magazines on political issues. PXX 84-85.

104. Mr. DeAngelo is not aware of any restrictions in Amtrak's retail leases that prevent the proprietors from selling books and magazines with political messages; nor does anyone from Amtrak review the content of the books and magazines that are sold in Penn Station from stores leased from Amtrak; nor is Mr. DeAngelo aware that anyone has ever complained about the political content of books or magazines sold by Penn Station retailers. DeAngelo Dep. 299:11-300:17.

IV. *The Creation and Control of Amtrak by the Federal Government*

The Creation of Amtrak

105. Congress created Amtrak in 1970, after determining that rail passenger service was deteriorating. Rail Passenger Service Act, 45 U.S.C. §501 *et seq.* ("RPSA"). **[Admit]**

106. In creating Amtrak, Congress directed that it:

> shall be operated and managed as a for profit corporation, the purpose of which shall be to provide intercity and commuter rail service, employing innovative operating and marketing concepts so as to fully develop the potential of modern rail service in meeting the Nation's intercity and commuter passenger transportation requirements.

45 U.S.C. § 541. **[Admit]**

107. Congress specifically encouraged Amtrak <u>inter alia</u> to engage in joint projects with state, regional and local governments, establishing as one of its goals:

> [e]ncouragement of State, regional, and local governments and the private sector to share the costs of operating rail passenger service, *including the costs of operating stations* and other facilities, *in order to minimize Federal subsidies.*

45 U.S.C. § 501a(2) (emphasis added). **[Admit]**

108. Under RPSA, the Secretary of Transportation, "acting in cooperation with other interested federal agencies and departments," designated the basic system of intercity passenger rail service to be provided by Amtrak. 45 U.S.C. § 521. The system, as so established, was not reviewable in any court. 45 U.S.C. § 522.**[Admit]**

109. More specifically, under RPSA, existing railroads could enter into contracts with Amtrak pursuant to which Amtrak, for a ~~fee~~ <u>payment</u>, would take over their services and relieve them of their responsibilities. 45 U.S.C. §§ 561(a)(1), (a)(2).**[Admit]**

110. All but three existing railroads chose to contract with Amtrak. PX 85. **[Admit]**

111. As a result, Amtrak, which was launched with a $40 million direct federal grant and $300 million in federal loan guarantees, assumed nearly all basic system intercity passenger service obligations. PX 110 at A1. **[Admit]**

Amtrak's Corporate Structure and Goals Are Mandated by the Federal Government

112. ~~Although~~ Congress created Amtrak as a "for profit" corporation and stated that it is not an agency of the federal government, 45 U.S.C. § 541~~,~~. ~~Congress ensured that it controlled all of the details of Amtrak's corporate governance, e.g.:~~

- ~~incorporation; 45 U.S.C. § 542~~
- ~~qualifications and appointment of directors and officers; 45 U.S.C. § 543(a)~~
- ~~bylaws; 45 U.S.C. § 543(b)~~
- ~~stock conversion and voting rights; 45 U.S.C. § 543(c)~~
- ~~appointment, tenure, and duties of the president and other officers; 45 U.S.C. § 543(d)~~
- ~~general provisions respecting common and preferred stock; 45 U.S.C. § 544~~ **[See Statute]**

113. ~~In addition, Congress ensured that Amtrak's Board of Directors would be one hundred percent controlled by the United States.~~ The Act provides that Amtrak will have a nine-member Board of Directors. The President of the United States appoints five members (three of whom are selected from lists of nominees drawn up by involved parties) and the Secretary of Transportation sits *ex officio*. 45 U.S.C. § 543. Two additional board members are selected by Amtrak's preferred stockholder—the federal government. *Id.*; PX 61 at 24. The president of Amtrak, who is selected by the rest of the directors, fills the final Board position. 45 U.S.C. § 543. **[OK]**

114. Amtrak's Board of Directors is responsible for providing direction to Amtrak and ~~has~~ would have the authority to approve or disapprove of Amtrak's advertising policies. DeAngelo Dep. 24:15-25:8; PX 72. **[OK]**

115. ~~The Board apparently has delegated its authority to approve or disapprove Amtrak's advertising policies to its Finance Committee, which delegated it to Anthony DeAngelo, the Vice President for Real Estate and Operations Development.~~ DeAngelo Dep. 24:15-25:8, 38:10-21, 55:11-24. The Board ~~has the authority to~~ could review and reverse Mr. DeAngelo's decisions regarding Amtrak's advertising standards. DeAngelo Dep. 37:17-38:9, 60:7-61:4. **[OK]**

116. Additionally, the Board, by resolution, has ~~specifically~~ authorized ~~Amtrak's~~ two current Amtrak agreements with ~~its advertising agent,~~ TDI. Delaney Dep. 81:10-24, DeAngelo Dep. 183:6-18; PX 65 at 7-8. Under those agreements, TDI can ~~lease~~ sell to third parties advertising space in Amtrak's train stations and on billboards along its right-of-ways. PXX 2, ¶ 1, 27; 127, ¶ 1. **[OK]**

117. Amtrak has issued both preferred and common stock. PX 61 at 24. The common stock is owned by ~~the~~ railroads and their successors which were relieved by Amtrak of their obligations to provide intercity rail service. 45 U.S.C. § 561. The common shares are not traded~~,~~. ~~and there is no evidence that they have any market value.~~ PX 86. **[OK]**

118. The Secretary of Transportation holds all of Amtrak's preferred stock for the benefit of the federal government. PX 61 at 23.[7] **[Admit]**

119. As Amtrak's preferred stockholder, the federal government is entitled to (1) cumulative dividends fixed at a rate of not less than six percent per annum (all of which must be paid before the holders of common stock can receive any payments) and (2) a liquidation preference over common shares involving a payment of not less than par value plus all accrued dividends. PX 61 at 24. **[Admit]**

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[7] The Act requires Amtrak to issue to the Secretary of Transportation preferred stock equal in par value to all federal operating payments and most federal capital payments received subsequent to October 1, 1981, as well as capital and certain operating payments received prior to that date. 45 U.S.C. § 544; PX 61 at 23. **[Admit]**

120. To date, Amtrak has paid no dividends on any stock. PX 61 at 26. **[Admit]**

Amtrak Has Rights, Privileges and Obligations Typically Conferred Only upon Governmental Entities

121. ~~While Congress has stated that Amtrak is not a federal government agency, it has substantial rights and privileges, and obligations otherwise conferred or imposed only on government agencies. *See infra* ¶¶ 122-37.~~

Rights and Privileges

122. The Secretary of Transportation, with the approval of the Secretary of the Treasury, can guarantee any obligation of Amtrak (including securities, loans, obligations and contracts) issued to finance the upgrading of capital equipment and facilities necessary for the improvement of Amtrak's passenger service, and all such guarantees "constitute general obligations of the United States of America backed by the full faith and credit of the Government of the United States of America." 45 U.S.C. § 602. **[See Statute]**

123. ~~Unlike any typical private entity,~~ Amtrak has been granted the right to exercise the power of eminent domain. 45 U.S.C. § 545(d); DeAngelo Dep. 150:18-152:4. **[OK]**

124. Amtrak is statutorily exempt from the applicability and operation of (1) regulations of the ICC and (2) state and local laws with respect to routes, service rates, fares and charges. 45 U.S.C. § 546(a), (c).

125. Amtrak is statutorily exempt from the burden of paying taxes or other fees (including <u>virtually</u> all real estate taxes) imposed by any state, political subdivision or local taxing authority, including ~~the burden of~~ paying New York real estate taxes on Penn Station. 45 U.S.C. § 546(b); DeAngelo Dep. 136:3-19, 137:6-25; *see also* PXX 9; 68; 90-92. **[OK]**

126. Only the Attorney General, or an aggrieved employee, can bring suit against Amtrak for a violation of the Act. 45 U.S.C. § 547. **[Admit]**

127. Only the Attorney General can sue Amtrak to complain of its discontinuance or reduction of services. 45 U.S.C. § 547."[8] **[Admit]**

128. Amtrak has the power to exclude all rail competitors from the ~~territories in~~ <u>routes over</u> which it is providing intercity rail services. 45 U.S.C. § 561(c). **[Admit]**

129. <u>Under certain circumstances,</u> Amtrak can demand that another railroad provide Amtrak with access to its tracks and facilities. If Amtrak and the other railroad cannot agree on the compensation to be provided for Amtrak's use of such tracks and facilities, the ICC can require the other railroad to make its property immediately available to Amtrak, with compensation to be subsequently fixed. 45 U.S.C. § 562(b). **[OK]**

130. If Amtrak has been provided with access to a railroad's facilities, such railroad cannot downgrade its facilities without prior authorization from the Secretary of Transportation. 45 U.S.C. § 566. **[Admit]**

Obligations

131. Amtrak is considered a "mixed-ownership Government corporation," 31 U.S.C. § 9101~~,~~ ~~as are, for example, the Federal Deposit Insurance Corporation and the Resolution Trust Corporation.~~ 31 U.S.C § 9101(2). [OK]

132. ~~As a mixed-ownership Government corporation,~~ Amtrak's financial transactions ~~are~~ <u>may be</u> periodically audited by the Comptroller General, whose audit reports are provided to Congress, the President and the Secretary of the Treasury. 31 U.S.C. § 9106. **[OK]**

133. Amtrak must submit three reports annually to Congress: (i) a report on the intercity passenger service; (ii) a report on its operations, including the amount of federal funds it will need in the coming year to sustain its services;

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[8] ~~With regard to such actions, Amtrak has argued that it should be treated as a government entity and afforded the same protection against damages that the United States enjoys under the Federal Tort Claims Act. See PX 67 at 31.~~ **[No—See Document; Just Wants Tort Reform]**

and (iii) a report on how Amtrak is meeting the mandate of providing a balanced national transportation system. 45 U.S.C. § 548; *see generally* DeAngelo Dep. at 130:14-21. **[Admit]**

134. Amtrak, like ~~any sovereign authority,~~ other privately owned railroads, employs its own police force "to provide security and protection for rail passengers." 45 U.S.C. § 545(j). These police carry guns and have the right to make arrests on Amtrak property. DeAngelo Dep. 158:8-24, 159:24-161:13. ~~They also are involved with the administration of Amtrak's "free speech" program.~~ Gallagher Dep. 45:9-51:6. **[OK]**

135. Amtrak~~, like other government entities,~~ is subject to compliance with the requirements of the Freedom of Information Act. 45 U.S.C. § 546; 49 CFR § 7.01 *et seq.* **[OK]**

136. ~~Congress itself recently recognized that Amtrak should be treated like a government entity with respect to t~~The Americans with Disabilities Act, ~~a statute which prohibits discrimination against disabled persons by public entities. The Act expressly~~ includes Amtrak in its definition of "public entity." 42 U.S.C. § 12101 *et seq.*; *see also* Gallagher Dep. 9:14-11:5; PX 74.[9] **[OK]**

137. ~~Amtrak's operations must be conducted in accordance with numerous other federal statutes specifically addressed to Amtrak, including: (1) RPSA, (2) the 3R Act, (3) the 4R Act, and (4) the Northeast Rail Service Act, 45 U.S.C. § 1101 *et seq.*~~ **[See Statute]**

[9] The term "public entity" is defined as (1) any State or local government, (2) any department, agency, special purpose district, or other instrumentality of a State or States or local government, and (3) the National Railroad Passenger Corporation and any state, local or regional commuter authority (45 U.S.C. § 502(8). 42 U.S.C. § 12131(1).

VI. *Amtrak's Acquisition of Penn Station*

138. Although Amtrak took over most intercity rail service by 1971 (*see supra* at ¶ 110-11), it neither owned track nor directly operated trains at that time. PXX 66 at 5-6; 69 at 1.[10] **[Admit]**

139. Amtrak first acquired track and substantial other railroad property on April 1, 1976 when, ~~as a direct result of government actions authorized by and conducted in accordance with~~ pursuant to the Regional Rail Reorganization Act of 1973 (the "3R Act"), 45 U.S.C. § 701 *et seq.*, and the Railroad Revitalization and Regulatory Reform Act (the "4R Act"), 45 U.S.C. § 801 *et seq.*, Amtrak acquired ownership and control of the Northeast Corridor (and other rail properties) and "became, for the first time, a fully operating railroad . . . ." PX 66 at 6.[11] **[OK]**

140. Amtrak acquired Penn Station, now "the busiest station in Amtrak's system,"[12] as part of its ~~federally mandated~~ acquisition of the rail properties in the Northeast Corridor. ~~The federal government compelled t~~The station's former owner (the Penn Central Transportation Company) ~~to~~ transferred the station to Consolidated Rail Corporation ("Conrail"), which in turn was ~~compelled by the federal government to~~ transferred ~~it~~ it to Amtrak. ~~Because of the importance of federal government involvement in Penn Station to~~

[10] Rather, it relied on contract service with the private railroads. *See, e.g.*, Gen. Acting Office, *Amtrak's Incentive Contracts with the Railroads — Considerable Costs, Few Benefits* (June 8, 1977); Laurence E. Tobey, *Costs, Benefits, and the Future of Amtrak*, XV Transp. L.J. 246, 269 (1987) ("*Costs, Benefits*"). **[OK]**

[11] The United States Railway Association defined the Northeast Corridor to ~~include Penn Station and~~ include "such properties presently used in passenger operations in the [Penn Central] main line route between Boston and Washington, D.C. via New London and Hell Gate Bridge, including all main line tracks, structures, power and control systems, stations, platforms, passenger yards and shops." PXX 68 at 42; 66 at 5.

[12] PXX 77 at 10-11; 88 at 20.

~~the state action issues in this case, the complete story of Amtrak's acquisition of Penn Station is set forth below.~~ *See infra* at ¶¶ *141-58*.

Congress' Statutory Plan

141. In 1973, Congress enacted the 3R Act to combat the public danger to essential rail services in the northeast and midwest caused by the widespread bankruptcies of railroads in those regions. *See, e.g.*, 45 U.S.C. § 701(a). **[Admit]**

142. ~~Under the 3R Act, bankrupt railroads located in the northeast and midwest could be compelled by the federal government to transfer ownership of their properties to others if such transfers would further the government's plan to reorganize the railroads into "an economically viable system capable of providing adequate and efficient rail service." 45 U.S.C. §§ 701(b)(2).~~ **[See Statute]**

143. ~~Under the 3R Act, the newly established United States Railway Association ("USRA"), a nonprofit government corporation, was authorized to develop and adopt a Final System Plan (the "Plan") identifying: (1) those rail properties that would be transferred, (2) the amount and type of compensation that would be afforded to transferors, and (3) the parties to whom the properties would be transferred or offered (*i.e.*, to Conrail for Amtrak, to Conrail for state, local or regional authorities, or to other railroads). 45 U.S.C. §§ 716(e)(1)(A) (D), (f); 717; 791(d).~~ **[See Statute]**

144. ~~USRA could require the transfer of "any assets or rights owned, leased or otherwise controlled by a railroad . . . which are used or useful in rail transportation service." 45 U.S.C. § 702(12). Thus, USRA could order that railroad tracks and stations, and even office buildings be transferred. *Id.*; *see also Penn Central Corp. v. United States Railway Ass'n*, 475 F. Supp. 165 (Regional Rail Reorg. Ct. 1979).~~ **[See Statute]**

145. To carry out the purposes of the 3R Act, USRA was authorized to (1) issue obligations guaranteed by the

Secretary of Transportation and (2) make loans to Conrail, Amtrak and other railroads. 45 U.S.C. §§ 720, 721. **[Admit]**

The Final System Plan

146. The Plan that USRA ultimately developed, which Congress approved, called for the transfer of specified rail properties owned by several insolvent rail carriers, including Penn Central Corporation (formerly, The Penn Central Transportation Company) and numerous of its affiliated companies (collectively, "Penn Central"), to Conrail, Amtrak (via Conrail) and, in some instances, other railroads. *See generally* PX 68 at Ch. 8. **[Admit]**

147. As contemplated by the 3R Act, the Plan recommended that properties in the Northeast Corridor (other than segments of properties already owned and leased by state or local transportation authorities) be transferred by their owners to Conrail and then acquired by Amtrak from Conrail by sale or lease. 45 U.S.C. §§ 716(c)(1)(C), 791(d); PX 68 at 3, 14, 37-38. **[See Statute]**

148. Congress, which considered the Northeast Corridor critical to effective rail reorganization and the Amtrak project itself, intended that Amtrak use the properties in that region in connection with its development of a high-speed passenger service. 45 U.S.C. §§ 501(c)(3), 545(h), 716(a)(3); PX 68 at 14. **[Admit]**

149. USRA justified transferring the Northeast Corridor properties to Amtrak by noting that sale or lease of such properties to Amtrak would "allow[] an unencumbered assumption of authority and responsibility that will simplify and accelerate the improvement program *and afford maximum protection to the public investment*." PX 68 at 42 (emphasis added). **[See entire paragraph of p. 42]**

The Transfer

150. As mandated by the 3R Act, USRA submitted its Plan to the Special Court, Regional Rail Reorganization Act (the

"Special Court"), and the Special Court ordered the owners of the designated properties to convey their properties in the manner and to the parties designated in the Plan. *See* 45 U.S.C. § 743(b). **[See Statute]**

151. Pursuant to the Plan, on April 1, 1976, Penn Central conveyed ~~Penn Station and its other~~ designated properties, including Penn Station to Conrail which in turn transferred ~~Penn Station and~~ the ~~other~~ Northeast Corridor properties (including hundreds of miles of track and Penn Station) to Amtrak.[13] *See* PXX 11; 12. *See also* DeAngelo Dep. 154:11-15; PXX 66 at 5-6; 24; 69 at 4 & Schedule.

152. By statute, the transfers were exempt from federal, state or local taxes. 45 U.S.C. § 743(e). **[See Statute]**

The Billion Dollar Purchase Price

153. Penn Central was not compensated for the transfer of Penn Station and its other rail properties until five years later when, on November 16, 1980, after almost five years of litigation and two years of settlement negotiations, the federal government ultimately paid for the transfer pursuant to the terms of a settlement agreement entered into by the United States, USRA and Penn Central (the "Settlement Agreement"). *See* PX 70. **[OK]**

154. In the Settlement Agreement, the United States and USRA, *inter alia*, agreed to pay to Penn Central $2.113 billion (comprising a compromise value plus interest) to compensate it for the ~~loss~~ transfer of ~~Penn Station and its other~~ the Northeast Corridor properties~~.~~, including Penn Station. PX 70 at § 4.01 and Table 1. **[OK]**

155. The Special Court approved the Settlement Agreement on December 4, 1980. PX 70. **[OK]**

---

[13] The properties conveyed to Amtrak, the majority of which were located in the Northeast Corridor, included 130 stations, maintenance facilities in 12 cities, additional passenger cars, locomotives and track maintenance equipment, and the ownership or operating rights to about 722 miles of railroad lines. PX 69 at 2 & Schedule.

156. At that time, the multi-billion dollar payment reportedly was the largest settlement payment made in United States history. PX 111. **[OK]**

157. The United States made the required $2.113 billion payment to Penn Central in cash on January 15, 1981. PX 112. **[OK]**

158. Amtrak still owns Penn Station today. DeAngelo Dep. 10:17-24. ~~However,~~ Amtrak can neither sell Penn Station nor enter into lease transactions relating to Penn Station involving "aggregate consideration in excess of $750 thousand" without the ~~express~~ approval of *its* Board of Directors. DeAngelo Dep. 25:18-26:19, 152:5-18; PX 71 at 9. The Board has delegated authority for less valuable leases to Mr. DeAngelo, ~~but retains control over the disposition and use of Amtrak's property.~~ *See* PX 71. **[OK]**

VI. *The Fiscal Interrelationship Between the Federal Government and Amtrak Is Extensive*

In Each Year of Its Existence, Amtrak Has Received Massive Federal Subsidies

159. Amtrak, by statute, is ~~entitled~~ permitted to receive direct financial subsidies from the federal government. 45 U.S.C. § 601. **[OK]**

160. ~~Indeed, as Amtrak itself admits, "Congress has never statutorily directed Amtrak to reach full operational self sufficiency." *See* PX 75 at 1. Instead, Congress "has encouraged [Amtrak to] operate in as cost effective manner as possible and make its decisions as if it were profit oriented." *Id.*~~ **[See entire paragraph of p. 1 of PX 75]**

161. Although Congress directed that Amtrak "shall be operated and managed as a for profit corporation" (45 U.S.C. § 541), it has never made a profit. DeAngelo Dep. 129:20-130:5, 130:22-132:16, 137:21-25. Each year that it has been in existence, Amtrak has received ~~substantial~~ federal subsidies—both for its operations and for capital acquisitions and improvements. *Id.*; PX 61 at 23. *See generally* PXX 67; 76; 87; 89; 93-94; 101-104. **[OK]**

162. Indeed, in 1976, Amtrak's fiscal year-end for accounting purposes was changed, pursuant to Public Law 94-25, from December 31 to September 30 "to coincide with the fiscal year adopted by the federal government and used in providing federal assistance to [Amtrak]." PX 66 at 6. **[OK]**

163. For 1993, Amtrak requested $331 million in operating subsidies and $572 million in capital improvements. PXX 76 at 1-2; 93 at 3-4. **[OK]**

164. In response to that request, Congress provided Amtrak with $700.1 million in federal funds (of which $331 million is for operating purposes) for 1993. *See* Pub. L. 102-388, 106 Stat. 1520, 1534 (October 6, 1992); PX 61 at 23. **[OK]**

165. Further, Congress also provided to the Secretary of Transportation $146 million to pay certain tax liabilities for 1993. Pub. L. 102-388, 106 Stat 1520, 1534 (Oct. 6, 1992). **[OK]**

166. During each of the past five years, Congress has appropriated hundreds of millions of dollars to subsidize Amtrak. The annual amounts are as follows:

1988—$630,300,000
1989—$630,000,000
1990—$656,000,000
1991—$684,000,000
1992—$712,000,000

45 U.S.C. § 601. **[OK]**

The Federal Government Has Invested Billions to Improve Amtrak's Properties and Services in the Northeast Corridor

167. Amtrak does approximately half of its business in the Northeast Corridor~~, and is (and has been) the largest single passenger carrier of any kind in that area.~~ PXX 61 at 17; 67 at 8; 77 at 7; 95 at 7; 96 at 7. **[OK]**

168. Amtrak values its properties in the Northeast Corridor at $3.422 billion. PX 61 at 18. **[OK]**

169. ~~The federal government paid for these properties (*see supra* at ¶¶ 153-58) and continues to have a substantial interest in them. In fact, t~~The federal government has held a mortgage ~~valued at "hundreds of millions of dollars"~~ on the Northeast Corridor properties since Amtrak acquired them in 1976. DeAngelo Dep. 153:7-23; PX 114 at IV-G-IV-J. **[OK]**

170. The Northeast Corridor Property Improvement Project, which was established pursuant to the 4R Act in 1976, authorized total appropriations of $2.5 billion for investment in the Northeast Corridor. 45 U.S.C. § 854; PX 87, Attachment 1 at 3. **[OK]**

171. Since then, the federal government has spent more than $2 billion to rehabilitate the Northeast Corridor roadbed and improve the region's services. PX 113. **[OK]**

172. For fiscal year 1993 alone, Amtrak requested $272 million in funds for the Northeast Corridor Improvement Project. **[OK]** ~~(including $8 million specifically earmarked for Penn Station tunnel and yard improvement).~~ *See* PXX 76 at 2, 23-24; 93 at 4. **[Not find in doc.]**

173. ~~The federal government invests in and subsidizes the Northeast Corridor in other ways as well. For example, Amtrak, through certain direct lessees of the federal government, subleases Union Station in Washington, D.C. from the federal government at a substantially below market rate. DeAngelo Dep. 10:4-16, 172:19-176:24.~~ **[See Depos.]**

174. Further, in 1988, the General Services Administration identified Amtrak as the primary preferred carrier for government business travel between ~~various~~ a few points on the Northeast Corridor. PX 67 at 8-9. **[OK]**

Amtrak Has Sought to Maximize Its Revenues Through Both Public and Private Sources

175. ~~Running an intercity passenger railroad like Amtrak is unprofitable.~~ DeAngelo Dep. 159:2-22.[14] At this time,

[14] In fact, it is so unprofitable that no other companies want to get into the business. *Id.*

Amtrak cannot ~~begin to~~ pay all of its operating costs or make all necessary capital improvements from its revenues and, ~~is~~ therefore ~~dependent upon~~ receives annual federal subsidies. DeAngelo Dep. 132:5-16. **[OK]**

176. ~~Because of Amtrak's dependence on federal subsidies, a dollar of revenue earned by Amtrak is a dollar saved by the United States. DeAngelo Dep. 132:5-16 (noting that increases in Amtrak's revenues are inversely proportionate to its federal subsidies); *cf.* PX 67 at 31 (Amtrak's president noting that "[b]ecause damage claims paid by Amtrak ultimately are borne by the Federal government, it is reasonable that [limitations in damages against the United States under the Federal Tort Claims Act] also be applied to Amtrak").~~

177. ~~According to Amtrak, Congress recognized this "revenue cross ratio" when it agreed with Amtrak that t~~The Federal Railroad Administration ~~(not Amtrak) should make~~ made statutorily required deposits in payment of Amtrak's Rail Retirement Tax Act liabilities, excess Railroad Unemployment Repayment Tax payments and excess Railroad Unemployment Insurance Act payments. DeAngelo Dep. 133:6-134:4; PXX 7 at 26; 61 at 24. Those payments have been in the millions of dollars. *See, e.g.*, PXX 7 at 26 ($145 million in 1991); 61 at 23-24 ($150 million in 1992). **[OK]**

178. In an attempt to meet its congressionally imposed goal of reducing its reliance on federal funding (*see* 45 U.S.C. § 501a(1)), Amtrak has sought to increase the revenues it receives from both public and private sources by, *inter alia*, entering into agreements such as the one with TDI that forms the backdrop of this case. *See generally* PXX 67; 87; 89; 93-94. **[OK]**

Amtrak's Advertising Revenues

179. ~~Recognizing the fiscal relationship between Amtrak and the federal government discussed above. Congress instructed Amtrak to use its "best business judgment in taking actions to minimize Federal subsidies" and, to that end, specifically encouraged Amtrak to maximize its revenues by~~

~~entering into profit-generating contracts with the private sector in order to reduce the level of federal subsidies. Indeed:~~

> Amtrak is encouraged to *enter into agreements* with the private sector and undertake initiatives which are consistent with good business judgment and *designed to* maximize its revenues and *minimize Federal subsidies*.

45 U.S.C. § 501a(14) (emphasis added) *see also* 45 U.S.C. § 501a(1). **[See statute; See Prior Sentence of statute]**

180. The federal government ~~closely monitors Amtrak's attempts to fulfill this congressional mandate, and~~ requires ~~regular~~ reporting by Amtrak. 45 U.S.C. § 548; 31 U.S.C. § 9106. **[OK]**

181. ~~As noted above,~~ Amtrak's profit-generating endeavors include the revenues derived from ~~leasing of~~ its station advertising space, including the Spectacular space in Penn Station, and ~~the leasing of~~ its outdoor billboard advertising space. *See* DeAngelo Dep. 98:15-20, 129:11-19, 148:9-150:12; PX 2, ¶ 3(c). **[OK]**

182. Amtrak earns a significant amount of advertising revenues each year—probably between $600,000 and $800,000—from these ~~leasing~~ agreements. DeAngelo Dep. 148:9-150:12. **[OK]**

183. Approximately $300-400,000 (or one-half of Amtrak's advertising revenues) come from the ~~leasing of~~ advertising space in railroad stations. DeAngelo Dep. 149:18-150:5. The balance is derived from the ~~leasing of~~ outdoor billboard space along its rights-of-way. *Id.* **[OK]**

184. At Penn Station, Amtrak generates advertising revenues ~~by leasing~~ from the advertising space in Penn Station that is within its control (*i.e.*, the advertising space in Penn Station not leased to LIRR). ~~Such leasing~~ The sale of such space is done ~~by Amtrak~~ exclusively ~~through~~ by TDI. DeAngelo Dep. 27:11-17, 27:24-28:19, 29:12-18; Bourque Dep. 50:18-23; PX 2, ¶ 1. **[OK]**

185. Pursuant to the parties' agreements, TDI ~~transfers~~ pay Amtrak a percentage of the revenues paid by advertisers~~,~~

~~minus its commission, to Amtrak.~~ PX 2, ¶ 6. *See also* DeAngelo Dep. 98:15-20; Notaro Dep. 46:20-25.

186. The money that Amtrak receives from ~~leasing~~ its advertising space, including the money that Amtrak receives from TDI for ~~the lease of~~ the Spectacular and other Penn Station advertising space, goes into its general accounts and becomes part of Amtrak's operating revenues~~,~~. ~~thereby reducing Amtrak's need for federal subsidies.~~ DeAngelo Dep. 129:11-130:5. **[OK]**

187. The United States continues to hold a mortgage valued at "hundreds of millions of dollars" on ~~Penn Station and~~ the Northeast Corridor properties, ~~that Amtrak acquired~~ including Penn Station. DeAngelo Dep. 153:7-23; PX 114 at IV-G-IV-J. **[OK]**

VII. *Amtrak Has Extensive Financial Interrelationships with Various State and Local Governmental Entities at Penn Station* **[All Irrelevant]**

188. ~~State governments and state agencies, like the federal government and federal agencies, have significant involvement in Amtrak's operations.~~ *See generally* PXX 7; 61; 66; 77; 88; 95-97. ~~In fact,~~ Amtrak has a corporate office entitled "Government and Public Affairs" which inter alia "work[s] with state and local governments, many of them . . . on a variety of Amtrak related issues which would go to legislation, it could go to financial support, it could go to operating requirements and regulations, et cetera, a whole range of issues like that." DeAngelo Dep. 194:9-195:23, 201:13-202:9. **[OK]**

189. ~~Further, Amtrak cooperates with, receives monetary and other assistance from, and provides monetary and other assistance to, a panoply of state governments and agencies.~~ *See generally* PXX 7; 61; 66; 67-79; 87-89; 93-97; 114-26.

190. Amtrak derives significant revenues from real estate ~~easements, leases and licenses~~ in the Northeast Corridor and hopes to increase those revenues in the future. PX 77 at 22. **[OK]**

191. ~~Amtrak's interrelationships with state and local government entities are particularly strong at Penn Station.~~

192. ~~For example, t~~Two ~~government entities~~ public authorities—New Jersey Transit and the LIRR—are tenants at Penn Station and~~, like Amtrak,~~ utilize Penn Station in the conduct and operation of their respective rail passenger services. DeAngelo Dep. 11:12-12:8; Gallagher Dep. 11:14-12:9; PXX 81; 105. **[OK]**

193. As noted above, Amtrak leased a portion of the A level of Penn Station to the LIRR for 99 years, for a total of $44.4 million. DeAngelo Dep. 11:12-23, 141:17-144:2; PXX 77 at 32; 81; 105. **[OK]**

194. ~~Amtrak has entered into "a whole series of leases, subleases and other arrangements" with New Jersey Transit. DeAngelo Dep. 11:24-12:8; PXX 74; 83. For example, for a fee, Amtrak allows New Jersey Transit to use space on Level B of Penn Station (the level on which the Spectacular is located (see supra ¶ 10)) for its ticket windows.~~ DeAngelo Dep. 185:4-187:7; *see also* PX 67 at 23.

195. ~~Although~~ Amtrak ~~"owns"~~ the space ~~provided~~ leased to New Jersey Transit (*see* PX 12)~~,~~. ~~the federal government determines the remuneration to be paid by New Jersey Transit for the space it leases from Amtrak.~~ DeAngelo Dep. 12:2-8.

196. ~~Amtrak's *physical* interrelationships with governmental transportation entities at Penn Station are especially extensive.~~ On the "A" level, both Amtrak and LIRR control space, and New York Transit authority subway lines abut the station at both ends. On the "B" level, Amtrak ~~shares space with~~ leases space to the New Jersey Transit~~, including~~ for ticket windows~~, a waiting area, and stairs to the trains~~. In addition, ~~Amtrak's~~ Amtrak at its information booth on the "B" level ~~is manned by Amtrak and~~ allows a New York City Transit authority ~~personnel.~~ employee to give information. ~~Moreover, a set of easements reflect the fact that passengers routinely pass through Penn Station to transfer from government transportation services to Amtrak and vice versa.~~

DeAngelo Dep. 16:19-17:12, 177:19-178:23, 179:5-12; Gallagher Dep. 16:24-20:6; 21:10-24-11; PXX 13-14; 54.

197. Further, Amtrak has entered into an agreement entitled "Northeast Corridor Service Agreement" with New Jersey Transit which, in 1993 alone, provides for a total estimated annual payment by New Jersey Transit to Amtrak of $21.13 million (of which $3 million is earmarked for "joint benefit" projects). PX 78 at 1; 79. **[OK]**

198. ~~Amtrak has entered into or assumed joint financial agreements related to Penn Station with both of its tenants and with numerous public entities or authorities operated by the state or local governments of New York and New Jersey including, among others, Metro North, which, like the LIRR, is a subsidiary of the Metropolitan Transportation Authority ("MTA"), and the Triborough Bridge and Tunnel Authority, the New York City Transit Authority and The Port Authority of New York and New Jersey.~~ *See* N.Y. Transp. Law § 219-C (McKinney 1975 & Supp. 1993); N.Y. Pub. Auth. Law §§ 552, 1201, 1263 (McKinney 1982 & Supp. 1993); N.J. Stat. Ann. § 32:1-4, 32:1-35.72 (West 1990). DeAngelo Dep. 185:4-186:4, 187:5-180:20; Gallagher Dep. 11:14-26:5; PXX 81; 82; 99; 100; 105; 114-126. For other government entities with whom Amtrak has contracted, *see generally* PXX 7; 61; 66-67; 76-77; 87-89; 93-97; 100; 125.

199. ~~In many instances, those agreements established long-term relationships between Amtrak and the contracting state entities involved. *Id.*~~

200. ~~Pursuant to those agreements, Amtrak:~~

- ~~is monitored and/or audited by the state entities involved;~~
- ~~receives funds from the state entities involved;~~
- ~~provides funds to the state entities involved;~~
- ~~shares costs, liabilities, and certain areas of Penn Station with the state entities involved; and~~

- ~~develops "improvements" jointly owned with the state entities involved.~~

See Gallagher Dep. 16:24-20:6, 32:38-33:24, 92:1-11; PXX 78 at 1; 79; 81-83; 96 at 29; 99; 100; 105; 114; 116; 119; 123.

201. ~~For example,~~ Amtrak, the MTA and the LIRR have entered into an agreement under which Amtrak and LIRR will jointly design, construct operate and maintain a modern system for the central control of train movements in and around Penn Station and the East River Tunnels. When the agreement was executed, the anticipated cost of the project was between $90 million and $120 million. The parties agreed to share the cost and ownership of the improvements. PXX 96 at 29; 99; 114; 124. **[OK]**

202. At the same time that it entered into its "traffic control" joint venture with the LIRR, Amtrak (1) leased the A level of Penn Station to LIRR for 99 years and (2) entered into a "facility agreement" pursuant to which it and LIRR will jointly use ~~Penn Station's operating~~ certain facilities for 99 years. DeAngelo Dep. 182:9-185:17, 187:13-188:7; PXX 81-82; 96 at 29; 99; 105. **[OK]**

203. Amtrak has entered into a "Northeast Corridor Services Agreement" with New Jersey Transit to improve service and equipment in the Northeast Corridor, ~~generally and in Penn Station specifically.~~ PX 83. ~~Amtrak's ability to operate reliably and effectively in the Northeast Corridor is "essential" to New Jersey Transit's operation.~~ PX 67 at 22. **[OK]**

204. ~~In both the LIRR and New Jersey Transit joint ventures, Amtrak has agreed to~~

- ~~jointly employ personnel with state entities, sharing salary expenses,~~
- ~~allow personnel of state entities to provide services on Amtrak property,~~
- ~~authorize its personnel (including persons responsible for clerical work, flag protection, electrical work, track, signal, communications, field engineering and~~

~~inspection work, security and other work) to perform work for state entities, with those entities reimbursing Amtrak for the expense of such work, and~~

~~— authorize its personnel to cooperate with state employees in matters that require cooperation including security, trash removal, maintenance, and preparation for special events (*e.g.*, the Democratic National Convention).~~

Bourque Dep. 12:12-25; Gallagher Dep. 16:24-20:6, 24:12-25:5, 32:11-33:24, 122:7-124:18; PXX 81-83; 99; 105; 114 at IV-E; 115; 118; 119; 121; 123; 126.

205. ~~Amtrak police will respond to calls for assistance by New Jersey Transit in Penn Station, where New Jersey Transit does not assign its own officers on a permanent basis. Gallagher Dep. 128:7 129:20,~~ **[See Deposition; No Foundation]**

206. Similarly, Amtrak and the State of New York jointly funded (paying 60 and 40 percent of cost, respectively) the "Westside Connection," a project which enabled direct connections between Amtrak's Northeast Corridor trains at Penn Station and trains for upstate New York and points west. PXX 7 at 11; 85 at 6; 96 at 22; 117. **[OK]**

207. ~~In addition to its joint ventures with state agencies and government corporations, Amtrak also has received from state agencies and government corporations various easements, leases and/or permits that (1) allow Amtrak to use the properties of those agencies, corporations and/or the general public, (2) allow those agencies, corporations and/or the general public to use Amtrak's properties. *See, e.g.*, PXX 81; 99; 100; 105; 116; 120; 125; DeAngelo Dep. 146:18 147:22. For example, Amtrak is party to "a variety of easements and cross easements and other legal arrangements" related to the New York subway system property that abuts Penn Station, including an easement which allows the public to walk from the subway to Penn Station and vice versa.~~ DeAngelo Dep. 12:22-13:15, 16:19-17:12. **[See Depo + obj]**

208. ~~When Amtrak grants such easements, leases and/or permits, it generally receives compensation "usually a lump sum, up front payment."~~ DeAngelo Dep. 179:5-12. **[See Depos + objections]**

209. ~~Because, as noted above (*supra* at ¶ 125), state and local governments are barred by federal statutes from collecting taxes from Amtrak relating to Penn Station (or other Amtrak property), those governments subsidize Amtrak's operation at the expense of their own budgets. 45 U.S.C. § 546(b); PX 56. For example, New York City assessed Amtrak's Penn Station property located in the City at $166,515,317. PX 56. At the City's stated tax rate, Amtrak, were it any ordinary nongovernmental for profit corporation, would have to pay to New York City a total of $17,813,808 in real estate taxes on Penn Station alone.~~ DeAngelo Dep. 136:3-10; PX 56.

New York, New York
January 25, 1993

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No. 93-1525

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL A. LEBRON,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX
EXHIBITS
(Pages J.A. 200 to 748)

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PLAINTIFF'S EXHIBIT 2

STATION ADVERTISING AGREEMENT
BY AND BETWEEN

NATIONAL RAILROAD PASSENGER CORPORATION

AND

TRANSPORTATION DISPLAYS. INC. (TDI)

This Agreement made this 15th day of March, 1991, between the NATIONAL RAILROAD PASSENGER CORPORATION, a corporation of the District of Columbia, having offices at 60 Massachusetts Avenue, N.E., Washington, DC 20002 (hereinafter referred to as "Amtrak"), and Transportation Displays, Inc. (TDI) a New York Corporation, having an office at 275 Madison Avenue, New York, N.Y. 10016 (hereinafter referred to as "TDI").

SECTION 1. *GRANT*

For and in consideration of the payments, covenants and agreements hereinafter mentioned, Amtrak does hereby grant to TDI the right and privilege to develop, construct, place and maintain posters, islands, TDI clocks and dioramas, and to sell advertising space thereon, at those locations which may be authorized by Amtrak, at the sole discretion of Amtrak. TDI may enter into contracts, licenses and sub-licenses for advertising displays in the name of TDI, but not in the name of Amtrak. Both Amtrak and TDI may develop, construct, place and maintain self-contained and manned floor exhibits and sell advertising space thereon in accordance with rates published by TDI, for the particular location. It is mutually agreed that TDI will use its best efforts to expand installed inventory to those stations listed on Exhibit A.

SECTION 2. *TERM*

Subject to the terms and conditions hereof, this Agreement shall be for a term of ten (10) years, commencing on March 1,

1991, and ending on the last day of February 2001 and shall continue from year-to-year thereafter unless either party hereto shall give to the other not less than (l) year's written notice of termination of this Agreement.

Amtrak may terminate this Agreement at any time with respect to all or any stations by giving thirty (30) day's prior written notice of termination and upon the date of termination specified in such notice, this Agreement shall cease, terminate and come to an end, provided, however, that this Agreement shall continue in full force and effect with respect to any individual advertising contract so long as said contract does not have an initial term in excess of one year, nor, in any event, be in effect for more than one year following said termination date.

In the event that ownership of a station changes or a party other than Amtrak assumes control of a station, that event shall cause notice of termination within 30 days.

Upon execution, this License shall terminate, cancel and supersede, an Agreement dated the first day of December, 1985, between Amtrak and Winston Network, Inc., whereby Amtrak granted Winston Network, the right and privilege to develop, construct, place and maintain posters, TDI clocks and dioramas, and to sell advertising thereon at those locations authorized by Amtrak.

SECTION 3. *GUARANTEED ANNUAL PAYMENT*

(a) In consideration of the rights and privileges granted herein, TDI agrees to pay to Amtrak, from the date of the commencement of this Agreement, a guaranteed annual minimum fee (hereinafter referred to as "Minimum Fee") of per year or if greater, a fee (hereinafter referred to as "Percentage Fee") equal to certain percentages of TDI's net receipts, as set forth in Section 3(c) and Section (e) below. On the first anniversary date of this Agreement; and on each anniversary date thereafter, for a period of five (5) years, said Minimum Fee shall be of the guaranteed annual payment payable hereunder in the year immediately preceding. Commencing March

l, 1996, and on each March 1 thereafter, said Minimum Fee shall be shall of the guaranteed annual payment hereunder in the year immediately proceeding.

(b) On or before the 25th day of each month, TDI shall furnish Amtrak with a complete statement of TDI's net receipts (as defined in subsection [e] of this Section 3 for the preceding month, (hereinafter "Net Receipts"). Such statement shall show the total amount of the Net Receipts for the preceding month, including the name of the advertiser(s), amount(s) billed, and amount(s) collected. TDI's check for Percentage Payment shall accompany each statement if in excess of 1/12 of the minimum annual fee.

(c) TDI shall pay to Amtrak the following percentages of Net Receipts, according to media used, as follows:

(i) Self-contained Floor Exhibits, if marketed by TDI

(ii) Clocks, Dioramas, Islands and Posters

By mutual agreement in writing, the parties hereto may add to the foregoing other media and the percentages of Net Receipts to be made applicable thereto.

(d) As used herein, "Installed Inventory" shall mean advertising display equipment as defined in Section 13 hereof. Exhibit "B" attached hereto and made part hereof sets forth the Installed Inventory, as of the date of execution hereof, at the rail passenger stations listed in said Exhibit "B".

(e) As used herein, "Net Receipts" shall mean and include the gross amounts paid to or received by TDI from advertisers or their advertising agencies for the use of advertising facilities under this Agreement; provided however that there shall be excluded from the computation of the Net Receipts the following:

(i) Standard advertising commissions paid to recognized advertising agencies with respect to the use of advertising facilities hereunder, not to exceed fifteen (15%) percent for all advertising media;

(ii) Quantity purchase discounts actually allowed by TDI to advertisers or their advertising agencies hereunder;

(iii) Taxes separately stated and paid by advertisers or their advertising agencies and payable to or for the account of TDI and

(iv) Any amounts received by TDI which are not related to the use of advertising facilities hereunder.

SECTION 4. *AUDITS*

(a) In order to verify the amount of Net Receipts reported by TDI for any year or portion thereof under this Agreement, Amtrak shall have the right, at any time (but not after 3 years subsequent to the expiration of any such year), to conduct an audit of TDI's books and records pertaining to this Agreement. Such audits may be made by Amtrak's Auditing Department or by independent Certified Public Accountants, or by any other agent selected by Amtrak, or by any federal agency (including the General Accounting Office) which has the right to audit accounts.

(b) If such audit reveals an understatement of TDI's Net Receipts for the period in question, and a consequent deficiency in Percentage Payment, TDI shall forthwith pay the amount of such deficiency to Amtrak, and the cost of such audit shall be borne by TDI and, if such audit reveals an overpayment of Percentage Payment, Amtrak shall credit against the next monthly installment(s) of Percentage Payment to fall due, the amount of such overpayment; provided, however, that if the amount of any refund due to TDI hereunder exceeds the aggregate of installment(s) of Percentage Payment total due, and if, and TDI has fully complied with all of the terms, covenants, conditions and provisions to be performed by TDI under this Agreement and is not indebted to Amtrak, the amount of such excess shall be paid to TDI within thirty (30) days. The cost of such audit shall be borne

by Amtrak. The provisions of this covenant shall survive the expiration or other termination of this Agreement.

SECTION 5. *LATE PAYMENT FEE*

If TDI fails to pay any Minimum Fee, Percentage Fee or additional fees, charges or sums hereunder on the day when the same shall become due and payable, TDI shall pay Amtrak a service charge at the then existing Manufacturers Hanover Trust Company prime rate of interest plus two percentum (2%) of the amount of such fees or additional fees, charges or sums, or all of them for each month or portion of a month that they or any of them remain unpaid.

SECTION 6. *APPROVAL OF ADVERTISING MATERIAL & LOCATIONS*

All advertising material, exhibit material, notices and advertisements, and their manner of presentation and design, shall be subject to approval by Amtrak, which may disapprove army such items at its own discretion. TDI will immediately remove, at its sole expense, upon written demand of Amtrak, any display, sign, poster, or other advertising material (including advertisement content) which may be considered objectionable by Amtrak. In the event that such matter is not removed immediately upon receipt of written demand, Amtrak may remove said material or display and TDI will pay any costs or expense incurred by Amtrak, including all labor charges and warehouse or storage rental incurred as a consequence of such action. Amtrak shall not, in any way, be held responsible or liable for any actions taken under this Section.

SECTION 7. *LAWS, ORDINANCES, RULES AND REGULATIONS*

(a) TDI shall comply with all applicable federal, state, and local laws, ordinances, rules and regulations and with the rules and regulations of Amtrak, in the erection, display and

maintenance of all advertising. In the event that such laws, ordinances, rules or regulations require removal of all or any TDI Installed Inventory, TDI shall promptly comply with such requirement at its own cost and expense.

(b) TDI shall procure all necessary licenses, certificates, permits and authorizations, and shall pay all costs thereof.

(c) In the event any category or categories of advertising shall be prohibited, the parties hereto agree to negotiate in good faith, an adjustment to the Guaranteed Annual Payment payable under Section 3 hereof, said adjustment to reflect the loss of such advertising categories. In particular, TDI shall not sell nor display advertisements competitive to Amtrak's own business.

SECTION 8. *RATES*

(a) TDI shall establish and print a schedule of rates for all advertising displayed under this Agreement.

(b) A copy of TDI's published rates, effective as of the date of this Agreement, is attached hereto as Exhibit "C". TDI shall furnish Amtrak with copies of all revisions, changes and amendments to Exhibit "C" within thirty (30) days of their publication.

(c) Amtrak shall furnish TDI with ridership information, as available. TDI shall furnish Amtrak with all data relevant to determining the schedule of rates for all advertising displayed under this Agreement.

SECTION 9. *CONTRACT FORMS*

TDI shall submit to Amtrak, for prior approval, all forms to be utilized by TDI for contracting with advertisers. Copies of all contracts or agreements made by TDI pursuant to this Agreement shall also be submitted, upon request, to Amtrak.

SECTION 10. *STORAGE SPACE*

Amtrak agrees, where conditions permit and space is available, to provide TDI with reasonable space within stations for handling and storing of TDI's supplies, materials and advertising matter to be used pursuant to this Agreement. Amtrak shall incur no cost, expense or liability whatsoever in connection with such space, and TDI, if required, shall pay market rate rental for any unimproved storage space made available by Amtrak for TDI's use.

SECTION 11. *WORK ON AMTRAK PROPERTY*

The work of constructing, maintaining, repairing, altering, renewing, relocating, or removing any Installed Inventory shall be done under such conditions as shall be satisfactory to and be approved in advance by the Chief Engineer of Amtrak, or his designee, and as will not interfere with the proper and safe use, operation and enjoyment of the property of Amtrak. No such work shall be undertaken by or on behalf of TDI without prior written approval as aforesaid. TDI, at its own cost and expense, shall, when performing any work in connection with any part of the Installed Inventory, arrange for any necessary watchmen or flagman to ensure that personnel, equipment and materials are kept a safe distance away from the railroad tracks and shall attend Amtrak sponsored safety classes, as required. Any notification required to be given to Amtrak by TDI shall be sent by certified mail to such persons and addresses as may be designated by Amtrak's Chief Engineer or his designee.

SECTION 12. *MAINTENANCE*

TDI agrees that it will furnish, mount, install and continuously maintain in a clean and first-class condition its Installed Inventory, as defined in SECTION 13, and all parts thereof, and, in general, do any and all work under this Agreement, subject to the supervision and approval of Amtrak, at such times and in such manner as in no way to

impede or interfere with the use or operation of Amtrak's facilities. TDI, its employees, servants, suppliers of materials, and furnishers of service shall have the right of ingress and egress at Amtrak's facilities, subject to prior approval by Amtrak in order to perform its obligations as set forth in this Agreement.

SECTION 13. *ADVERTISING EQUIPMENT*

(a) TDI shall furnish, mount and install its own advertising display equipment, including, but not limited to frames, boards, clocks, poster panels, exhibits, dioramas, or any other advertising display equipment, at its sole cost and expense. All equipment is and shall remain the property of TDI, unless owned by a third party and installed in stations on a rental basis.

(b) TDI agrees to survey all TDI-installed equipment within sixty (60) days of commencement of this Agreement and to submit to Amtrak a written plan to replace old equipment and/or add new equipment to the Installed Inventory. Such plan shall be evaluated by Amtrak and Amtrak and TDI shall mutually agree on additions to Installed Inventory. It is the intent of TDI to increase its capital investment and improvements in Installed Inventory in Amtrak stations over the term of this Agreement by Five Hundred Thousand Dollars ($500,000), in addition to improvements specified in the predecessor agreement of $500,000 and specifically to include those improvements listed in Exhibit D.

(c) Upon expiration or termination of this Agreement for any reason, TDI at its sole cost and expense, shall remove from the property, facilities and premises of Amtrak, all Installed Inventory, including but not limited to advertising frames, clocks, displays, exhibits, and advertising equipment and materials which TDI and those claiming by, through or under it were permitted to install or maintain under the rights and privileges given by this Agreement, and shall restore said

property, facilities and premises, reasonable wear and tear excepted.

(d) If TDI shall fail to commence removal of its Installed Inventory within thirty (30) days after expiration or termination, then Amtrak may effect such removal and restoration at the expense of TDI, and TDI agrees to pay Amtrak the reasonable cost and expense thereof promptly upon receipt of invoice therefor.

SECTION 14. *ELECTRICITY*

(a) Amtrak shall provide existing electrical current for the illumination/operation of advertising displays and clocks for that equipment documented in Exhibit B and Exhibit D.

(b) Amtrak shall not be responsible for reductions or interruptions in the supply of electrical power.

SECTION 15. *NON-INTERFERENCE WITH CONCESSIONAIRES*

The rights and privileges granted herein to TDI shall not be deemed to limit the right of Amtrak to grant tenants, licensees and concessionaires the right to advertise in the premises or space used by them by agreement of Amtrak.

SECTION 16. *TERMINATION BY AMTRAK*

In addition to any other termination rights contained in the Agreement, Amtrak shall have the right, upon sixty (60) days written notice to TDI, to terminate this Agreement any time after the occurrence of any one or more of the following events:

(i) Non-payment of the Guaranteed Annual Payment or Percentage Payment due Amtrak when such non-payment shall continue for a period of twenty (20) days.

(ii) If any petition shall be filed by or against TDI to declare TDI bankrupt or to delay, reduce or mod-

ify TDI's debts or obligations or if TDI be declared insolvent according to law, or if any assignment of TDI's property shall be made for the benefit of creditors, or if a receiver or trustee is appointed for TDI or its property, Amtrak may treat the occurrence of any one or more the foregoing events as breach of the Agreement without notice, and immediately enter and repossess the spaces covered hereunder.

(iii) Abandonment by TDI of and discontinuance of operations hereunder.

(iv) Non-performance of any covenant of this Agreement, excluding the covenant of payment herein contained, and failure of TDI to remedy such breach within a period of sixty (60) days after receipt of written notice from Amtrak of the existence of said breach.

(v) If TDI becomes permanently deprived of the rights, powers and privileges necessary to the proper conduct and operations of the Installed Inventory specified in this Agreement.

(vi) Damage by fire or other casualty to the stations listed in Exhibit A hereto.

(vii) Assumption of control of any of the aforesaid station by parties other than Amtrak.

SECTION 17. *TERMINATION BY TDI*

In addition to any other termination rights contained in this Agreement, this Agreement shall be subject to termination by TDI in the event any one or more of the following events occur:

(i) The permanent abandonment of Amtrak's transportation system, or substantial portions thereof.

(ii) The lawful assumption by the United States Government, or any authorized agency thereof, of the operation, control or use of the transportation facilities covered hereunder, or any substantial part or parts thereof in such a manner as to substantially restrict TDI from operating therefrom for a period in excess of ninety (90) days.

(iii) Issuance by any court of competent jurisdiction of any injunction in any way preventing or restraining the use of Amtrak's facilities, and the remaining in force of such injunction for a period in excess of ninety (90) days.

(iv) The default by Amtrak in the performance of any covenant or agreement herein required to be performed by Amtrak, and the failure of Amtrak to remedy such default for a period of sixty (60) days after receipt of written notice by TDI to remedy the same.

SECTION 18. *ABANDONMENT, LEASES, SALES*

(a) This Agreement is expressly made subject to any abandonment of a part of a line or lines or any facilities or terminals of Amtrak, to any and all sales, leases, assignments or licenses of any of the aforementioned property or premises by Amtrak, to the provisions of all leases or agreements under which Amtrak holds said property or premises, to all encumbrances, conditions, covenants, rights and easements to which the title of Amtrak is or may be subject, to all other leases or licenses to which Amtrak is or may be subject, to all leases or licenses which Amtrak may have granted or may grant in the future to other parties, and to the right of Amtrak at any and all times: (1) to place or cause to be placed, notices and bulletins (in locations other than on TDI's signs) advertising its own services and matters of interest to the public or for the information of employees or patrons of Amtrak, (2) to sell,

lease or license any and all of its property and premises, and (3) to carry on all of its general and special business operations.

(b) In the event Amtrak desires at any time or times to sell, assign, lease, license or otherwise dispose of any or all of its property, facilities, and premises, or to abandon any part of a line or lines of railroad, TDI at TDI's sole cost and expense, shall in any and all such events remove forthwith, upon notice from Amtrak, any and all Installed Inventory and advertising matter thereon permitted hereunder that Amtrak specifies should be removed from the property, facilities or premises to be sold, leased, licensed, or otherwise disposed of.

SECTION 19. *FORCE MAJEURE, STRIKE, ETC.*

(a) If TDI is deprived of advertising space in any or all the stations set forth in Exhibit A hereto for more than thirty (30) successive days by reason of force majeure, strike, fire, loss of inventory by action of Amtrak or other cause beyond the control of TDI, then the Guaranteed Annual Payment payable shall be adjusted and/or abated to reflect the loss of use of the space on a pro-rata basis.

(b) If TDI is totally deprived of advertising space in all the aforesaid stations for more than sixty (60) successive days because of force majeure, labor strike, or any other cause beyond the control of TDI, or if the public is totally denied normal access to such stations for any reason, then TDI may cancel this Agreement in its entirety as of the date of such deprivation of space or denial of access by giving Amtrak written notice of its intention do to so, without any further liability being incurred thereby on the part of TDI or Amtrak.

SECTION 20. *INSURANCE AND LIABILITY*

(a) TDI shall indemnify and save harmless Amtrak and its directors, officers, employees, agents, representatives, contractors, invitees or any other persons from all suits and

action of every type and description brought against them, or which may arise as a result of any injuries or damages received or sustained by any person, persons or property, or from acts of said TDI, its agents, servants or employees, performed on the premises of Amtrak.

(b) TDI shall indemnify and save harmless Amtrak and its directors, officers, employees, agents, representatives, contractors, invitees or any other persons against any claims or liability arising from or based upon the violation of any federal, state county or city laws, by-laws, ordinances, or regulations, by TDI, its agents, servants and employees.

(c) Protection against loss by fire or other casualty to the Installed Inventory or to any part thereof or to the contents of any advertising displays shall not at any time be an obligation of Amtrak.

(d) TDI shall procure and maintain at all times during the term of this agreement, at its own cost and expense, the insurance specified below. All insurance shall be placed with insurance carriers acceptable to Amtrak and licensed to do business in the states where the signs are located. TDI shall furnish Amtrak with a certificate or certificates of insurance giving evidence of the required coverage at the exercise of this agreement and on an annual basis thereafter. With respect to Railroad Protective Liability Insurance, TDI shall furnish Amtrak with the original policy at the exercise of this agreement and on an annual basis thereafter. No acceptance by Amtrak of any insurance certificate or policy required hereunder shall constitute or be construed as a waiver by Amtrak of the requirements below which shall be and remain the sole responsibility of TDI. All insurance shall provide for 30 days prior written notice to be given to Amtrak in the event coverage is substantially changed, cancelled, or non-renewed. Such notices shall be mailed to Amtrak marked, "Attention: Vice President-Real Estate and Operations Development", at the address set forth on page first hereof. The failure by TDI at any time to procure and/or maintain any of the below stated

insurance will constitute a default under Section 30 hereof and Amtrak may terminate this agreement. Amtrak reserves the right to increase the required coverage at any time at the sole discretion of Amtrak.

(i) *Commercial General Liability Insurance*—Issued to and covering liability imposed upon TDI with respect to the operations of this agreement, and all obligations assumed by TDI under the terms of this agreement. Products/completed operations, independent contractors, contractual, and personal injury/advertising liability coverages are to be included, and Amtrak is to be named as an additional insured with respect to TDI's operations in connection with this agreement. Coverage under this policy shall have limits of liability of not less than two million dollars ($2,000,000) combined single limit for bodily injury (including disease or death), personal injury, and property damage (including loss of use) liability.

(ii) *Workers' Compensation Insurance*—Complying with the requirements of the statutes of jurisdiction in which operations of TDI will take place, covering all employees of TDI. Employers' Liability coverage with limits of liability of not less than five hundred thousand dollars ($500,000) each accident or illness shall be included.

(iii) *Railroad Protective Liability Insurance*—TDI shall provide, with respect to its operations or operations of its subcontractors within fifty (50) feet vertically or horizontally of railroad tracks, Railroad Protective Liability Insurance, AAR-AASHTO (ISO/RIMA) Form, in the name of National Railroad Passenger Corporation (Amtrak). The policy shall have limits of liability of not less than two million dollars ($2,000,000) per occurrence, combined single limit,

for coverages A and B, for losses arising out of injury to or death of all persons, and for physical loss or damage to or destruction of property, including the loss of use thereof. A six million dollar ($6,000,000) annual aggregate may apply. The policy shall be endorsed to protect Amtrak against all risk of liability arising directly or indirectly from TDI's use or occupancy of any sign location pursuant to this agreement.

(iv) *Property Insurance*—covering all sign structures and improvements against loss or damage by fire and such other damage by hazards as are included in the extended coverage endorsement in an amount not less than ninety percent (90%) of the full replacement cost of such property. This insurance shall contain a waiver of subrogation against Amtrak.

SECTION 21. *ASSIGNMENT, SUCCESSORS AND ASSIGNS*

(a) TDI shall not assign or transfer any of the rights or privileges granted herein without the prior written approval of Amtrak, which approval shall not be unreasonably withheld.

(b) The terms of this Agreement shall be binding upon the executors, administrators, successors and assigns of the parties hereto.

SECTION 22. *PATENTS AND TRADEMARKS*

TDI represents that it is the owner of or fully authorized to use any and all services, processes, machines, articles, marks, names or slogans used by it in its operations under or connected with this Agreement. TDI agrees to save and hold Amtrak, its directors, officers, employees, agents, representatives, contractors, invitees or any other persons free and harmless of and from any loss, liability, expenses, suit or

claim for damages in connection with any actual or alleged infringement of any patent, trademark or copyright, or arising from any alleged or actual unfair competition or other similar claim arising out of the operations of TDI under or connected with this Agreement.

SECTION 23. *CONDUCT OF EMPLOYEES*

TDI agrees that while its officers, agents and employees are on Amtrak premises, and about the station buildings, platforms and grounds, it will cause them to conduct themselves in a proper manner, and if complaint is made by Amtrak, it will forthwith take such corrective measures as are necessary.

SECTION 24. *NOTICES*

All notices, consents, demands, approvals, and requests ("notices") which are required or permitted to be given by either party to the other, pursuant to any provision of this Agreement, shall be sent by United States certified mail, return receipt requested, and shall be addressed as follows (or to such other address as either party may designate from time to time by written notice to the other):

(i) If to Amtrak:

National Railroad Passenger Corporation
60 Massachusetts Avenue, N.E.
Washington, DC 20002
Attention: Vice President-Real Estate and
Operations Development

(ii) If to TDI:

Transportation Displays, Incorporated
275 Madison Avenue
New York, NY 10016
Attention: Senior Vice President, Franchises

SECTION 25. *WAIVER*

No waiver of any term, condition or breach of this Agreement on any occasion shall be deemed to be a waiver of any other term, condition or breach of this Agreement on any other occasion, or a waiver of any continuing or subsequent breach of the same term or condition.

SECTION 26. *INDEPENDENT CONTRACTOR*

TDI is a independent professional firm contracting with Amtrak to provide expert assistance. TDI, its directors, officers, employees, agents, and servants are not to be deemed employees, agents, or servants of Amtrak. TDI assumes full responsibility for liability arising out of the negligence of its employees, whether by action or inaction. Amtrak assumes no liability or responsibility for the negligent acts of TDI, its directors, officers, employees, agents, or servants, by virtue of entering into this Agreement. TDI is and shall remain an independent contractor under the terms of this Agreement.

SECTION 27. *INTERPRETATION OF AGREEMENT*

This Agreement shall be governed and constructed in accordance with the laws of the District of Columbia.

SECTION 28. *SECTION TITLES*

The titles of Sections are for ease of reference only, and shall not be construed to control or in any way alter the plain meaning of the text of this Agreement.

SECTION 29. *NON-DISCRIMINATION*

TDI, in exercising any of the rights or privileges herein granted to it, shall not, on the grounds of age, sex, religion, race, color or national origin, discriminate or permit discrimination against any person or group of persons in any manner prohibited by federal, state or local laws. TDI shall comply with such Equal Opportunity and Affirmative Action

policies required of Amtrak contractors as Amtrak may establish from time-to-time.

SECTION 30. *ENTIRE AGREEMENT*

(a) This Agreement represents the entire understanding and agreement between the parties with respect to the subject matter hereof.

(b) This Agreement may not be changed orally. This Agreement may be changed only by mutual agreement in writing.

(c) If any provision of this Agreement is determined to be invalid or unenforceable, it shall be considered deleted herefrom and shall not invalidate the remaining provisions hereof.

SECTION 31. *PRIOR AGREEMENTS*

This Agreement cancels and supersedes all prior agreements relating to the subject matter of this Agreement between TDI or predecessors to TDI and Amtrak and the predecessors of Amtrak, as such Agreements pertain to the property and land that is owned, leased or otherwise used or occupied by Amtrak.

SECTION 32. *PUBLIC SERVICE ADVERTISING*

(a) TDI shall provide space for public service and Amtrak advertising on a preemptible basis. All public service advertising shall be subject to removal at any time for the benefit of paying advertisers.

(b) Public service advertising shall be entitled, at TDI discretion, to receive unsold advertising space at no space charge. However, TDI shall be permitted to charge a one-time labor fee to cover its out-of-pocket labor costs. Such labor fee shall not be deemed a part of TDI's Net Receipts as defined in this Agreement.

(c) TDI, in addition to providing public service advertising at no space cost, shall provide advertising space, on a preemptible basis, to legitimate non-profit organizations, at an established discount from regular space rate. The availability of the discount on the space rate shall be determined by TDI at its own discretion. All revenues collected pursuant to this subsection shall be subject to regular revenue sharing with Amtrak.

(d) Amtrak reserves the right to place its own messages, publicizing its own services, on the facilities covered by this Agreement. TDI will post and remove all such messages for Amtrak at no charge to Amtrak. All copies shall be provided to TDI by Amtrak at Amtrak's expense. All messages posted pursuant to this sub-section shall be on a preemptible basis for the benefit of paying advertisers, and shall be reasonable as to quantity to be posted. All materials to be posted shall be delivered to TDI not less than three (3) weeks prior to the required posting date.

SECTION 33. *ARBITRATION*

Any controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association and judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

IN WITNESS WHEREOF, the parties hereto, by their authorized officers, have executed this Agreement as of the day and year first above written.

ATTEST:
By: [ILLEGIBLE] /s/
Witness

TRANSPORTATION DISPLAYS, INC.

By: [ILLEGIBLE] /s/
Executive Vice President

Date: [ILLEGIBLE]

NATIONAL RAILROAD PASSENGER
CORPORATION

By: TONY DE ANGELO by [ILLEGIBLE]
Tony DeAngelo
Vice President
Real Estate and
Operations Development

Date: March 28, 1991

EXHIBIT A

Station Advertising Agreement by and between National Railroad Passenger Corporation (Amtrak) and Transportation Displays, Inc. (TDI).

Stations where advertising is installed

1. New York Penn Station
2. Princeton Junction, New Jersey
3. Trenton, New Jersey
4. Newark, New Jersey
5. Wilmington, Delaware
6. Baltimore Penn Station
7. Philadelphia 30th Street Station
8. North Philadelphia
9. Septa Stations owned by Amtrak
10. New Carrollton, Maryland
11. Washington D.C. Union Station

Stations specifically excluded from Agreement

1. Chicago Union Station

Stations for expansion

1. Providence, R.I.
2. Albany/Rensselaer, N.Y.
3. Hudson, New York
4. Rhinecliff, New York
5. Kingston, Rhode Island
6. Old Saybrook, Connecticut
7. New London, Connecticut
8. Connecticut Commuter Stations
9. BWI
10. Westerly, Rhode Island

PLAINTIFF'S EXHIBIT 3

IN-STATION ADVERTISING AGREEMENT
BY AND BETWEEN NRPC and WNI

FORM PARAGRAPHS

___	ISAA. 0		*INTRODUCTION*
___	ISAA. 1	SECTION 1.	*GRANT*
___	ISAA. 2	SECTION 2.	*TERM*
___	ISAA. 3	SECTION 3.	*ANNUAL PAYMENT*
___	ISAA. 4	SECTION 4.	*NEW YORK CITY-PENNSYLVANIA STATION ADVERTISING SPECTACULAR DISPLAY*
___	ISAA. 5	SECTION 5.	*AUDITS*
___	ISAA. 6	SECTION 6.	*APPROVAL OF ADVERTISING MATERIAL & LOCATIONS*
___	ISAA. 7	SECTION 7.	*LAWS, ORDINANCES, RULES AND REGULATIONS*
___	ISAA. 8	SECTION 8.	*RATES*
___	ISAA. 9	SECTION 9.	*CONTRACT FORMS*
___	ISAA. 10	SECTION 10.	*STORAGE SPACE*
___	ISAA. 11	SECTION 11.	*WORK ON AMTRAK PROPERTY*
___	ISAA. 12	SECTION 12.	*MAINTENANCE*
___	ISAA. 13	SECTION 13.	*ADVERTISING EQUIPMENT*
___	ISAA. 14	SECTION 14.	*ELECTRICITY*
___	ISAA. 15	SECTION 15.	*NON-INTERFERENCE WITH CONCESSIONAIRES*
___	ISAA. 16	SECTION 16.	*TERMINATION BY AMTRAK*
___	ISAA. 17	SECTION 17.	*TERMINATION BY WNI*
___	ISAA. 18	SECTION 18.	*ABANDONMENT, LEASES, SALES*

___	ISAA. 19	SECTION 19.	*FORCE MAJEURE, STRIKE, ETC.*
___	ISAA. 20	SECTION 20.	*INSURANCE AND LIABILITY*
___	ISAA. 21	SECTION 21.	*ASSIGNMENTS, SUCCESSORS AND ASSIGNS*
___	ISAA. 22	SECTION 22.	*PATENTS AND TRADEMARKS*
___	ISAA. 23	SECTION 23.	*CONDUCT OF EMPLOYEES*
___	ISAA. 24	SECTION 24.	*NOTICES*
___	ISAA. 25	SECTION 25.	*WAIVER*
___	ISAA. 26	SECTION 26.	*INDEPENDENT CONTRACTOR*
___	ISAA. 27	SECTION 27.	*INTERPRETATION OF AGREEMENT*
___	ISAA. 28	SECTION 28.	*SECTION TITLES*
___	ISAA. 29	SECTION 29.	*NON-DISCRIMINATION*
___	ISAA. 30	SECTION 30.	*ENTIRE AGREEMENT*
___	ISAA. 31	SECTION 31.	*PRIOR AGREEMENT*
___	ISAA. 32	SECTION 32.	*PUBLIC SERVICE ADVERTISING*
___	ISAA. 33	SECTION 33.	*ARBITRATION*
___	ISAA. 34		*IN WITNESS*

IN-STATION ADVERTISING AGREEMENT
BY AND BETWEEN

NATIONAL RAILROAD PASSENGER CORPORATION

AND

WINSTON NETWORK, INC.

This Agreement (Agreement), dated as of the first-day of December, 1985, is made between the NATIONAL RAILROAD PASSENGER CORPORATION, a Corporation of the District of Columbia, having an office at 400 North Capitol Street, Washington, DC 20001 (hereinafter referred to as "Amtrak"), and Winston Network, Inc., a New York Corporation, having an office at 275 Madison Avenue, New York, New York 10016 (hereinafter referred to as "WNI").

SECTION 1. *GRANT*

For and in consideration of the payments, covenants and agreements hereinafter mentioned, Amtrak does hereby grant to WNI the right and privilege to develop, construct, place and maintain posters, WNI Islands, clocks and dioramas, and to sell advertising space thereon, at those locations listed in Exhibit A hereto as well as at additional locations which may be authorized by Amtrak, at the sole discretion of Amtrak. WNI may enter into contracts, licenses and sub-licenses for advertising displays in the name of WNI, but not in the name of Amtrak. Both Amtrak and WNI may develop, construct, place and maintain self-contained floor exhibits and sell advertising space thereon.

SECTION 2. *TERM*

Subject to all the terms and conditions hereof, this Agreement shall be for a term of five (5) years, commencing on December 1, 1985, and ending on November 30, 1990 and shall continue from year-to-year thereafter unless either party hereto shall give to the other not less than one (1) year's written notice of termination of this Agreement; which notice shall expire on the last day of the term or the last day of any subsequent additional year, as the case may be.

Amtrak may terminate this Agreement at any time with respect to all or any stations by giving thirty (30) days prior written notice of termination and upon the date of termination specified in such notice, this Agreement shall cease, terminate and come to an end, provided, however, that this Agreement shall continue in full force and effect with respect to any individual advertising contract so long as said contract does not have an initial term in excess of one year, nor, in any event, be in effect for more than one year following said termination date.

SECTION 3. *ANNUAL PAYMENT*

(a) In consideration of the rights and privileges granted herein, WNI agrees to pay to Amtrak, on and after the first anniversary date of this Agreement, a guaranteed annual payment based on Installed Inventory; as defined herein and the applicable percentages of net receipts (hereinafter "Percentage Payment"), as set forth in Section 3(d) and Section (e) below. On the second anniversary date of this Agreement; and on each anniversary date thereafter, said guaranteed annual payment shall be one hundred and ten percent (110%) of the guaranteed annual payment payable hereunder in the year immediately preceding.

(b) On or before the 25th day of each month, WNI shall furnish Amtrak with a complete statement of WNI's net receipts (as defined in subsection (f) of this Section 3 for the preceding month, (hereinafter "Net Receipts"). Such statement shall show the total amount of Net Receipts for the preceding month, including the name of the advertiser(s), amount(s) billed, and amount(s) collected. WNI's check for Percentage Payment shall accompany each statement if in excess of $^{1}/_{12}$ of the minimum annual fee.

(c) Within forty-five (45) days following the close of each year and of this Agreement and each continued year hereunder, WNI shall furnish Amtrak with a consolidated statement of Net Receipts (hereinafter "Net Receipts") for the year in question, certified by an independent Certified Public Accountant.

(d) WNI shall pay to Amtrak the following percentages of Net Receipts according to media used, as follows:

(i) Self-contained Floor Exhibits, if marketed by WNI	–60%
(ii) Clocks, Dioramas, Posters and WNI Island Displays	–50%

By mutual agreement in writing the parties hereto may add to the foregoing other media and the percentages of Net Receipts to be made applicable thereto.

Percentages of Net Revenue payable by WNI hereunder shall be no lower than those payable by WNI to railroads other than Amtrak:

(e) As used herein, "Installed Inventory" shall mean advertising display equipment as defined in Section 13 hereof.

Exhibit "A" attached hereto and made part hereof sets forth the Installed Inventory, as of the date of execution hereof, at the rail passenger stations listed in said Exhibit "A". On the anniversary date of each year of this Agreement; and each continued year, WNI shall deliver to Amtrak a revised Exhibit A, specifying additions to, and deletions from the previous year's Installed Inventory. The guaranteed annual fee shall be adjusted annually (on the anniversary date of this Agreement) by mutual agreement between Amtrak and WNI, to reflect all changes in Installed Inventory.

(f) As used herein, "Net Receipts" shall mean and include the gross amounts paid to or received by WNI from advertisers or their advertising agencies for the use of advertising facilities under this Agreement; provided, however, that there

shall be excluded from the computation of Net Receipts the following:

(i) Standard advertising commissions paid to recognized advertising agencies with respect to the use of advertising facilities hereunder, not to exceed fifteen (15%) percent for all advertising media;

(ii) Quantity purchase discounts actually allowed by WNI; to advertisers or their advertising agencies hereunder;

(iii) Taxes separately stated and paid by advertisers or their advertising agencies and payable to or for the account of WNI; and

(iv) Any amounts received by WNI which are not related to the use of advertising facilities hereunder.

(v) Labor fees charged by WNI to public service advertising pursuant to Section 32(b) hereof.

SECTION 4. *NEW YORK CITY—PENNSYLVANIA STATION ADVERTISING SPECTACULAR DISPLAY*

(a) This Agreement cancels and supersedes that certain Permit for Advertising Display Facilities, between Amtrak and WNI, dated August 15, 1980, Permit No. 31-01-047.

SECTION 5. *AUDITS*

(a) In order to verify the amount of Net Receipts reports by WNI for any year or portion thereof under this Agreement, Amtrak shall have the right, at any time (but not after 2 years subsequent to the expiration of any such year), to conduct an audit of WNI's books and records pertaining to this Agreement. Such audits may be made by Amtrak's Auditing Department or by independent Certified Public Accountants, or by any other agent selected by Amtrak, or by any federal agency (including the General Accounting Office) which has the right to audit accounts.

(b) If such audit reveals an understatement of WNI's Net Receipts for the period in question, and a consequent deficiency in Percentage Payment, WNI shall forthwith pay the amount of such deficiency to Amtrak, and, if such audit reveals an overpayment of Percentage Payment, Amtrak shall credit against the next monthly installment(s) of Percentage Payment to fall due, the amount of such overpayment; provided, however, that if the amount of any refund due to WNI hereunder exceeds the aggregate of installment(s) of Percentage Payment total due, and if, and WNI has fully complied with all of the terms, covenants, conditions and provisions to be performed by WNI under this Agreement and is not indebted to Amtrak, the amount of such excess shall be paid to WNI within thirty (30) days. The cost of such audit shall be borne by Amtrak. The provisions of this covenant shall survive the expiration or other termination of this Agreement.

SECTION 6. *APPROVAL OF ADVERTISING MATERIAL & LOCATIONS*

All advertising material, exhibit material, notices and advertisements, and their manner of presentation and design, shall be subject to approval by Amtrak, which may disapprove any such items at its own discretion. WNI will immediately remove, at its sole expense, upon written demand of Amtrak, any display, sign, poster, or other advertising material (including advertisement content) which may be considered objectionable by Amtrak. In the event that such matter is not removed immediately upon receipt of written demand, Amtrak may remove said material or display and WNI will pay any costs or expense incurred by Amtrak, including all labor charges and warehouse or storage rental incurred as a consequence of such action. Amtrak shall not, in any way, be held responsible for liable for any actions taken under this Section.

SECTION 7. *LAWS, ORDINANCES, RULES AND REGULATIONS*

(a) WNI shall comply with all applicable federal, state, and local laws, ordinances, rules and regulations and with the rules and regulations of Amtrak, in the erection, display and maintenance of all advertising. In the event that such laws, ordinances, rules or regulations require removal of all or any WNI Installed Inventory, WNI shall promptly comply with such requirement at its own cost and expense.

(b) WNI shall procure all necessary licenses, certificates, permits and authorizations, and shall pay all costs thereof.

(c) In the event any category or categories of advertising shall be prohibited, the parties hereto agree to negotiate in good faith, an adjustment to the Percentage Payment payable under Section 3 hereof, said adjustment to reflect the loss of such advertising categories.

SECTION 8. *RATES*

(a) WNI shall establish and print a schedule of rates for all advertising displayed under this Agreement.

(b) A copy of WNI's published rates, effective as of the date of this Agreement, is attached hereto as Exhibit "B". WNI shall furnish Amtrak with copies of all revisions, changes and amendments to Exhibit "B".

(c) Amtrak, shall furnish WNI with ridership information, as available. WNI shall furnish Amtrak with all data relevant to determining the schedule of rates for all advertising displayed under this Agreement.

SECTION 9. *CONTRACT FORMS*

WNI shall submit to Amtrak, for prior approval, all forms to be utilized by WNI for contracting with advertisers. Copies of all contracts or agreements made by WNI pursuant to this Agreement shall also be submitted, upon request, to Amtrak.

SECTION 10. *STORAGE SPACE*

Amtrak agrees, where conditions permit and space is available, to provide WNI with reasonable space within stations for handling and storing of WNI's supplies, materials and advertising matter to be used pursuant to this Agreement. Amtrak shall incur no cost, expense or liability whatsoever in connection with such space, and WNI, if required, shall pay market rate rental for any unimproved storage space made available by Amtrak for WNI's use.

SECTION 11. *WORK ON AMTRAK PROPERTY*

The work of constructing, maintaining, repairing, altering, renewing, relocating, or removing any Installed Inventory shall be done under such conditions as shall be satisfactory to and be approved in advance by the Chief Engineer of Amtrak, or his designee, and as will not interfere with the proper and safe use, operation and enjoyment of the property of Amtrak. No such work shall be undertaken by or on behalf of WNI without prior written approval as aforesaid. WNI, at its own cost and expense, shall, when performing any work in connection with any part of the Installed Inventory, arrange for any necessary watchmen or flagman to ensure that personnel, equipment and materials are kept a safe distance away from the railroad tracks. Any notification required to be given to Amtrak by WNI shall be sent by certified mail to such persons and addresses as may be designated by Amtrak's Chief Engineer or his designee.

SECTION 12. *MAINTENANCE*

WNI agrees that it will furnish, mount, install and continuously maintain in a clean and first-class condition its Installed Inventory and all parts thereof, and, in general, do any and all work under this Agreement, subject to the supervision and approval of Amtrak, at such times and in such manner as in no way to impede or interfere with the use or operation of Amtrak's facilities. WNI, its employees, ser-

vants, suppliers of materials, and furnishers of service shall have the right to ingress and egress at Amtrak's facilities, subject prior approval by Amtrak in order to perform its obligations set forth in this Agreement.

SECTION 13. *ADVERTISING EQUIPMENT*

(a) WNI shall furnish, mount and install, its own advertising display equipment, including, but not limited to frames, boards, clocks, poster panels, islands, exhibits, dioramas, or any other advertising display equipment, at its sole cost and expense. All equipment is and shall remain the property of WNI, unless owned by a third party and installed in stations on a rental basis.

(b) WNI agrees to survey all WNI-installed equipment within one year of commencement of this Agreement and to submit to Amtrak a written plan to replace old equipment and/or add new equipment to the Installed Inventory. Such plan shall be evaluated by Amtrak and Amtrak and WNI shall mutually agree on additions to Inventory. It is the intent of WNI to increase its capital investment and improvements in Installed Inventory in Amtrak stations over the term of this Agreement by $1,000,000.

(c) Upon expiration or termination of this Agreement for any reason, WNI, at its sole cost and expense, shall remove from the property, facilities and premises of Amtrak, all Installed Inventory, including but not limited to advertising frames, clocks, displays, exhibits, and advertising equipment and materials which WNI and those claiming by, through or under it were permitted to install or maintain under the rights and privileges given by this Agreement, and shall restore said property, facilities and premises, reasonable wear and tear excepted.

(d) If WNI shall fail to commence removal of its Installed Inventory within ninety (90) days after expiration or termination, then Amtrak may effect such removal and restoration

at the expense of WNI, and WNI agrees to pay Amtrak the reasonable cost and expense thereof promptly upon receipt of invoice therefor.

SECTION 14. *ELECTRICITY*

(a) Amtrak shall provide existing electrical current for the illumination/operation of advertising displays and clocks.

(b) Amtrak shall not be responsible for reductions or interruptions in the supply of electrical power.

SECTION 15. *NON-INTERFERENCE WITH CONCESSIONAIRES*

The rights and privileges granted herein to WNI shall not be deemed to limit the right of Amtrak to grant tenants, licensees and concessionaires the right to advertise in the premises or space used by them by agreement of Amtrak.

SECTION 16. *TERMINATION BY AMTRAK*

In addition to any other termination rights contained in the Agreement, Amtrak shall have the right, upon sixty (60) days written notice to WNI, to terminate this Agreement any time after the occurrence of any one or more of the following events:

(i) Non-payment of Percentage Payment due Amtrak when such non-payment shall continue for a period of twenty (20) days after written notice of demand for payment.

(ii) If any petition shall be filed by or against WNI to declare WNI bankrupt, or to delay, reduce or modify WNI's debts or obligations or if WNI be declared insolvent according to law, or if any assignment of WNI's property shall be made for the benefit of creditors, or if a receiver or trustee is appointed for WNI or its property, Amtrak may treat the occurrence of any one of more of the

foregoing events as breach of the Agreement without notice, and immediately enter and repossess the spaces covered hereunder.

(iii) Abandonment by WNI of and discontinuance of operations hereunder.

(iv) Non-performance of any covenant of this Agreement, excluding the covenant of payment herein contained, and failure of WNI to remedy such breach within a period of sixty (60) days after receipt of written notice from Amtrak of the existence of said breach.

(v) If WNI becomes permanently deprived of the rights, powers and privileges necessary to the proper conduct and operations of the Installed Inventory specified in this Agreement.

(vi) Damage by fire or other casualty to the stations listed in Exhibit A hereto.

(vii) Assumption of control of any of the aforesaid station by parties other than Amtrak.

SECTION 17. *TERMINATION BY WNI*

In addition to any other termination rights contained in this Agreement, this Agreement shall be subject to termination by WNI in the event any one or more of the following events occur:

(i) The permanent abandonment of Amtrak's transportation system, or substantial portions thereof.

(ii) The lawful assumption by the United States Government, or any authorized agency thereof, of the operation, control or use of the transportation facilities covered hereunder, or any substantial part or parts thereof in such a manner as to substantially restrict WNI from operating therefrom for a period in excess of ninety (90) days.

(iii) Issuance by any court of competent jurisdiction of an injunction in any way preventing or restraining the use of Amtrak's facilities, and the remaining in force of such injunction for a period in excess of ninety (90) days.

(iv) The default by Amtrak in the performance of any covenant or agreement herein required to be performed by Amtrak, and the failure of Amtrak to remedy such default for a period of sixty (60) days after receipt of written notice by WNI to remedy the same.

SECTION 18. *ABANDONMENT, LEASES, SALES*

(a) This Agreement is expressly made subject to any abandonment of a part of a line or lines or any facilities or terminals of Amtrak, to any and all sales, leases, assignments or licenses of any of the aforementioned property or premises by Amtrak, to the provisions of all leases or agreements under which Amtrak holds said property or premises, to all encumbrances, conditions, covenants, rights and easements to which the title of Amtrak is or may be subject, to all other leases or licenses to which Amtrak is or may be subject, to all leases or licenses which Amtrak has granted or may grant in the future to other parties, and to the right of Amtrak at any and all times: (1) to place or cause to be placed, notices and bulletins (in locations other than on WNI's signs) advertising its own services and matters of interest to the public or for the information of employees or patrons of Amtrak, (2) to sell, lease or license any and all of its property and premises, and (3) to carry on all of its general and special business operations.

(b) In the event Amtrak desires at any time or times to sell, assign, lease, license or otherwise dispose of any or all of its property, facilities, and premises, or to abandon any part of a line or lines of railroad, WNI at WIN's sole cost and expense, shall in any and all such events remove forthwith, upon notice from Amtrak, any and all Installed Inventory and advertising

matter thereon permitted hereunder that Amtrak specifies should be removed from the property, facilities or premises to be sold, leased, licensed, or otherwise disposed of.

SECTION 19. *FORCE MAJEURE, STRIKE, ETC.*

(a) If WNI is deprived of advertising space in any or all the stations set forth in Exhibit A hereto for more than thirty (30) successive days by reason of force majeure, strike, fire, or other cause beyond the control of WNI, then the Percentage Payment payable shall be adjusted and/or abated to reflect the loss of use of the space on a pro-rata basis.

(b) If WNI is totally deprived of advertising space in all the aforesaid stations for more than sixty (60) successive days because of force majeure, labor strike, or any other cause beyond the control of WNI, or if the public is totally denied normal access to such stations for any reason, then WNI may cancel this Agreement in its entirety as of the date of such deprival of space or denial of access by giving Amtrak written notice of its intention do to so, without any further liability being incurred thereby on the part of WNI or Amtrak

SECTION 20. *INSURANCE AND LIABILITY*

(a) WNI shall indemnify and save harmless Amtrak and its directors, officers, employees, agents and representatives from all suits and action of every name and description brought against them, or which may arise as a result of any injuries or damages received or sustained by any person, persons or property, or from acts of said WNI, its agents, servants or employees, performed on the premises of Amtrak.

(b) WNI shall indemnify and save harmless Amtrak and its directors, officers, employees, agents and representatives against any claims or liability arising from or based upon the violation of any federal, state, county or city laws, by-laws, ordinances, or regulations, by said WNI, its agents, servants and employees.

(c) Protection against loss by fire or other casualty to the Installed Inventory or to any part thereof or to the contents of any advertising displays shall not at any time be an obligation of Amtrak.

(d) WNI shall, at its own cost and expense, maintain in effect at all times during the existence of this Agreement, Workmen's Compensation and Comprehensive Public Liability Insurance, insurance against death, personal injury, property damage, and legal-contractual liability, arising from or in connection with acts or omissions pursuant to this Agreement, in an amount not less than Three Million Dollars ($3,000,000.00) combined single limit.

(e) During such times as WNI is performing major construction or major repairs, as determined by Amtrak, WNI will provide Railroad Protective Liability Insurance written for and on behalf of Amtrak, providing limits of Two Million Dollars ($2,000,000.00).

(f) Upon execution of this Agreement by Amtrak, WNI shall furnish certificates of such required insurance, as to contents and carriers, to Amtrak, which will contain the following provisions:

(i) Thirty (30) days prior notice to Amtrak of policy cancellation or termination.

(ii) Under all policies of insurance, Amtrak shall be included as an additional named insured.

SECTION 21. *ASSIGNMENT, SUCCESSORS AND ASSIGNS*

(a) WNI shall not assign or transfer any of the rights or privileges granted herein without the prior written approval of Amtrak, which shall not be unreasonably withheld.

(b) The terms of this Agreement shall be binding upon the executors, administrators, successors and assigns of the parties hereto.

SECTION 22. *PATENTS AND TRADEMARKS*

WNI represents that it is the owner of or fully authorized to use any and all services, processes, machines, articles, marks, names or slogans used by it in its operations under or connected with this Agreement. WNI agrees to save and hold Amtrak, its directors, officers, employees, agents and representatives free and harmless of and from any loss, liability, expenses, suit or claim for damages in connection with any actual or alleged infringement of any patent, trademark or copyright, or arising from any alleged or actual unfair competition or other similar claim arising out of the operations of WNI under or connected with this Agreement.

SECTION 23. *CONDUCT OF EMPLOYEES*

WNI agrees that while its officers, agents and employees are on Amtrak premises, including but not limited to, rail cars, and about the station buildings, platforms and grounds, it will cause them to conduct themselves in a proper manner, and if complaint is made by Amtrak, it will forthwith take such corrective measures as are necessary.

SECTION 24. *NOTICES*

All notices, consents, demands, approvals, and requests ("notices") which are required or permitted to be given by either party to the other, pursuant to any provision of this Agreement, shall be sent by United States certified mail, return receipt requested, and shall be addressed as follows (or to such other address as either party may designate from time to time by written notice to the other):

(i) If to Amtrak:

National Railroad Passenger Corporation
400 North Capitol Street, NW
Washington, DC 20001
Attention: Vice President-Real Estate

(ii) If to WNI:

Winston Network, Inc.
275 Madison Avenue
New York, NY 10016
Attention: Senior Vice President, Franchise

SECTION 25. *WAIVER*

No waiver of any term, condition or breach of this Agreement on any occasion shall be deemed to be a waiver of any other term, condition or breach of this Agreement on any other occasion, or a waiver of any continuing or subsequent breach of the same term or condition.

SECTION 26. *INDEPENDENT CONTRACTOR*

WNI is an independent professional firm contracting with Amtrak to provide expert assistance. WNI, its directors, officers, employees, agents, and servants are not to be deemed employees, agents, or servants of Amtrak. WNI assumes full responsibility for liability arising out of the negligence of its employees, whether by action or inaction. Amtrak assumes no liability or responsibility for the negligent acts of WNI, its directors, officers, employees, agents, or servants, by virtue of entering into this Agreement. WNI is and shall remain an independent contractor under the terms of this Agreement.

SECTION 27. *INTERPRETATION OF AGREEMENT*

This Agreement shall be governed and constructed in accordance with the laws of the District of Columbia.

SECTION 28. *SECTION TITLES*

The titles of Sections are for ease of reference only, and shall not be construed to control or in any way alter the plain meaning of the text of this Agreement.

SECTION 29. *NON-DISCRIMINATION*

WNI, in exercising any of the rights or privileges herein granted to it, shall not, on the grounds of age, sex, religion, race, color or national origin, discriminate or permit discrimination against any person or group of persons in any manner prohibited by federal, state or local laws. WNI shall comply with such Equal Opportunity and Affirmative Action policies required of Amtrak contractors as Amtrak may establish from time-to-time.

SECTION 30. *ENTIRE AGREEMENT*

(a) This Agreement represents the entire understanding and agreement between the parties with respect to the subject matter hereof.

(b) This Agreement may not be changed orally. This Agreement may be changed only by a mutual agreement in writing.

(c) If any provision of this Agreement is determined to be invalid or unenforceable, it shall be considered deleted herefrom and shall not invalidate the remaining provisions hereof.

SECTION 31. *PRIOR AGREEMENTS*

This Agreement cancels and supersedes all prior agreements relating to the subject matter of this Agreement between WNI and Amtrak and the predecessors of Amtrak, as such Agreements pertain to the property and land that is owned, leased or otherwise used or occupied by Amtrak.

SECTION 32. *PUBLIC SERVICE ADVERTISING*

(a) WNI shall provide space for public service advertising on a preemptible basis. All public service advertising shall be subject to removal at any time for the benefit of paying advertisers.

(b) Public service advertising shall be entitled, at WNI, discretion, to receive unsold advertising space at no space charge. However, WNI shall be permitted to charge a one-time labor fee to cover its out-of-pocket labor costs. Such labor fee shall not be deemed a part WNI's Net Receipts as defined in this Agreement.

(c) WNI, in addition to providing public service advertising at no space cost, shall provide advertising space, on a preemptible basis, to legitimate non-profit organizations, at an established discount from regular space rate. The availability of the discount on the space rate shall be determined by WNI at its own discretion. All revenues collected pursuant to this subsection shall be subject to regular revenue sharing with Amtrak.

(d) Amtrak reserves the right place its own messages, publicizing its own services, on the facilities covered by this Agreement. WNI will post and remove all such messages for Amtrak at no charge to Amtrak. All copy shall be provided to WNI by Amtrak at Amtrak's expense. All messages posted pursuant to this sub-section shall be on a preemptible basis for the benefit of paying advertisers, and shall be reasonable as to quantity to be posted. All materials to be posted shall be delivered to WNI not less than three (3) weeks prior to the required posting date.

SECTION 33. *ARBITRATION*

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association and judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

IN WITNESS WHEREOF, the parties hereto, by their authorized officers, have executed this Agreement as of the day and year first above written.

ATTEST:

By: [illegible]/s/
Witness

WINSTON NETWORK, INC.

By: [illegible]/s/
Senior Vice President

Date: [illegible]

ATTEST:

By: [illegible]/s/
Witness

NATIONAL RAILROAD PASSENGER CORPORATION

By: [illegible]/s/
Assistant Vice President
Real Estate

Date: February 28, 1986

EXHIBIT A

STATION	*1-SH.*	*2-SH.*	*3-SH.*	*CLCKS*	*DRMS*	*OTHER*
PENN STATION-NY	0	44	39	0	0	0
PRINCETON JUNCT.	9	32	20	1C	0	0
TRENTON	1	42	9	4D	0	0
PROVIDENCE	5	5	14	0	0	0
WILMINGTON	0	0	8	0	0	0
PENN STA.-BALT.	0	22	24	0	0	0
PENN STATION-NY Vert.	9	237	108	3C	34	1 - 5
				62D		7 Vert.
						2 Exh.
						1
Rolari						
						1 Exh.
30TH STREET	0	118	50	0	10	
30TH ST(NOT)	0	24	40	2C	0	3 Island
N. PHILADELPHIA	8	18	0	0	0	
OVERBROOK	7	13	6	0	0	
MERION	1	4	4	0	0	
NARBETH	0	4	3	0	0	
WYNNEWOOD	9	9	12	1C	0	
ARDMORE	7	18	4	0	0	
HAVERFORD	4	10	12	0	0	
BRYN MAWR	9	8	16	1C	0	
ROSEMONT	4	9	4	0	0	
VILLANOVA	5	4	6	1C	0	
RADNOR	5	9	3	0	0	
ST. DAVIDS	0	1	10	0	0	
WAYNE	9	12	4	0	0	
STRAFFORD	3	9	2	0	0	

STATION	*1-SH.*	*2-SH.*	*3-SH.*	*CLCKS*	*DRMS*	*OTHER*
DEVON	6	8	1	1C	0	
BERWYN	3	7	3	0	0	
DAYLESFORD	0	3	0	0	0	
PAOLI	8	17	23	1C	0	
TOTAL	112	687	425	77	44	

PLAINTIFF'S EXHIBIT 4

PERMIT FOR
ADVERTISING DISPLAY FACILITY
(ADF)

THIS PERMIT AGREEMENT is made this 15th day of August, 1980, by and between the NATIONAL RAILROAD PASSENGER CORPORATION, a Corporation of the District of Columbia, with offices at 400 North Capitol Street, N.W., Washington, D. C. 20001 (hereinafter called the "Permittor"), and TRANSPORTATION DISPLAYS INC., a Corporation of the State of New York, with offices at 275 Madison Avenue, New York, New York 10016, (hereinafter called the "Permittee").

1. GRANT

WITNESSETH, that for and in consideration of the payments, covenants and agreements hereinafter mentioned, stipulated and contained, on the part of the Permittee to be paid, kept and performed, Permittor does hereby permit the Permittee to be the sole and exclusive advertising sales representative for the advertising spectacular display hereinafter described and to maintain, at Permittee's sole cost and expense, said advertising spectacular display (hereinafter called the "facility") for sale to advertisers, being 100 feet in length by 10 feet in width situate over Permittor's ticket counter located on the west side of the Ticket Concourse of Permittor's Pennsylvania Station situate between Eighth and Seventh Avenues, 31st to 33rd Streets, in the Borough of Manhattan, City, County and State of New York.

2. PURPOSE

The purpose of the Permittor in extending the permission granted hereby is to have available at the location aforementioned the services which the Permittee is authorized to render hereunder, and with respect hereto the Permittee agrees that it will conduct a first class operation and will furnish all necessary equipment, personnel, supplies, materials and other facilities therefor.

3. RESERVATION

Permittor hereby reserves unto itself and its licensees the right and easement to maintain, repair and renew any pipe, conduit, electric and communication lines, and any other facilities of like character, as may now exist or may hereafter be placed upon, under or over the facility, it being agreed that this permit is subject and subordinate to any and all such rights, easements and uses. Permittee shall occupy and use the facility in a careful, safe and orderly manner so as not to interfere in any way with the maintenance or operation of the business of Permittor or of its licensees or with any structures or facilities appurtenant to the business of Permittor or of its licensees.

4. EFFECTIVE PERIOD

The effective period of this Permit is Five (5) years, commencing on the First day of January 1980, and ending on the Last day of December 1984, yielding and paying therefor to Permittor, without any previous demand therefor, such fees, additional charges and sums as hereinafter set forth at P.O. Box 1582, Group No. 5, Washington, D. C. 20013, or at any such other place as Permittor may from time to time designate.

5. TERMINATION

Permittor shall have the right to terminate this permit at any time during the effective period hereof by giving to Permittee at least Ninety (90) days prior written notice of intention so to do in the event that the Permittor shall desire to use the facility, or any portion thereof, either for itself or through agreement with others for transportation or public service purposes, or for construction, reconstruction, demolition, sale or lease of that portion of the building of which the demised premises constitute a part and upon the date of termination specified in such notice this permit shall cease, terminate and come to an end. In the event of the expiration or termination of this permit, whether under the provisions of this Section "5", or otherwise, Permittee shall peaceably quit and deliver possession of the facility to Permittor on or before such date of expiration or termination.

If the last day of the term of this permit falls on Sunday this permit shall expire on the business day immediately preceding.

6. COMPENSATION

The Permittee shall pay to Permittor from the date of commencement of this permit fees which shall be equal to sixty-five per centum (65%) of the monthly gross receipts of Permittee from said facility; said fee to be paid in equal monthly installments, on or before the fifteenth (15th) day of each succeeding month during the continuance of this permit, said payment to be accompanied by a true statement, signed by Permittee's chief financial officer, of Permittee's gross receipts during the preceding month in such form and detail as the Permittor may request (Permittor reserves the right at any time and from time to time to change said form and/or request different or additional information); adjustments on account thereof shall be made for the preceding year hereunder within thirty (30) days following the end of said yearly

period. On or before such day, Permittee shall furnish Permittor with a statement of its gross receipts for the said yearly period attested to by Permittee's chief financial officer or by the Certified Public Accountant then under retainer by Permittee for the audit of its books and records (if Permittee shall have such public accountant then under retainer) or such other person normally charged by the Permittee with such responsibility for the audit or maintenance of Permittee's books and records.

The term "Gross Receipts" as used in this Permit shall mean and include all gross revenue of Permittee, derived from or attributable to the use, enjoyment or operation of the facility, including, without limitation, the following:

All gross revenues (i) for the use of facility under any use or occupancy agreements, written or oral and however denominated (whether sub-lease, license, concession, franchise, privilege or otherwise), from any persons, including subtenants, licensees, concessionaires or otherwise, (ii) for and in consideration of the cancellation, surrender or modification of any such agreement, (iii) for the admission to or use of facilities forming a part of or appurtenant to the facility (iv) from the operation or use of the facility or any business conducted thereon by Permittee and (v) all amounts paid by advertisers or users of the facility to Government Authorities or persons other than Permittee in discharge of obligations of Permittee, whether or not arising out of or in connection with the facility.

Provided however that "Gross Receipts" shall not mean or include the following:

(1) Agency commissions, cash discounts, or fees paid to collection agencies, excluding however commissions of any kind of parent, subsidiary, or affiliated companies.

Permittee further covenants and agrees to pay to the Permittor, as additional fees for the electric current and ventilation furnished, a sum of Eight Hundred Thirty One and 78/100 Dollars ($831.78) per month commencing January 1, 1980, said sum to be paid in advance on the first day of each

and every month during the continuance of this agreement at the office hereinbefore designated; provided, however, that from time to time the amount of such additional fees shall be reviewed and adjusted by the Permittor in accordance with Permittee's actual consumption of electricity and the rate charged Permittor therefor.

If Permittor is entitled to an adjustment of the fees in accordance with the above provisions, Permittor shall send a notice to Permittee setting forth the new fees. Any delay of Permittor in sending such notice shall not constitute a waiver of or in any way impair the continuing obligation of Permittee to pay such fee adjustments. In the event of an adjustment in the fees applicable to the permit year in which this permit terminates, the Permittee shall pay to the Permittor any additional fees owed for the months elapsed in such permit year within fifteen (15) days after such notice.

7. RECORD KEEPING: AUDITS

Permittor shall have the right, at any time and from time to time (but not after three (3) years subsequent to the expiration of the pertinent permit year), to cause an audit of Permittee's operation of the facility to be made by Permittor's Auditing Department, an independent Certified Public Accountant, or a firm of independent Certified Public Accountants or any other agent of Permittor selected by Permittor, or any federal agency including the General Accounting Office which has the right to audit Permittor's accounts, to verify the amount of Permittee's gross receipts reported by Permittee for any permit year or portion thereof.

If such audit reveals an understatement of Permittee's gross receipts for the period in question and a consequent deficiency in the payment of percentage fees, Permittee shall forthwith pay the amount of such deficiency to Permittor, and if such audit reveals an overpayment of percentage fees, Permittor shall credit against the next monthly installment(s) of fees falling due the amount of such overpayment; provided,

however, that if the amount of any refund due Permittee hereunder exceeds the aggregate remaining installment(s) of fees and Permittee has fully complied with all of the terms, covenants, conditions and provisions to be performed by Permittee under this permit and is not indebted to Permittor, the amount of such excess shall be paid by Permittee within thirty (30) days after Permittee has duly vacated the facility. The cost of such audit shall be borne by Permittor unless such audit reveals a deficiency of more than two percent (2%) or Five Hundred Dollars ($500.00), whichever is the lesser, in the percentage fees which should have been paid by Permittee for the period in question, in which event Permittee shall pay to Permittor on demand the costs of such audit and ten percent (10%) of the amount so underpaid as additional fees. Any payment, credit or refund to be made under this provision shall be without interest. The provisions of this covenant shall survive the expiration or other termination of this permit.

Permittee agrees to maintain and keep at its offices aforementioned for a period of not less than three (3) years following the end of each permit year, records which shall show annual gross receipts from the facility. For the period of three (3) years following the expiration or earlier termination of this permit, all of the records provided for hereunder shall be made available to Permittor upon written demand therefor by Permittor to Permittee, and to that extent the provisions of this covenant shall survive the expiration of the term.

It is the purpose and intent of the Permittor and Permittee that the annual fees shall be absolutely net to the Permittor, so that this permit shall yield, to the Permittor, the fees hereinbefore provided on the dates specified, and that all costs, fees, interest, charges, expenses, reimbursements, and obligations of every kind and nature whatsoever relating to the facility (excepting any payments on account of any fee mortgage which the Permittor may place upon the fee) which may arise or become due during or out of the term if this permit shall be paid or discharged by the Permittee as additional fees, and the

Permittee hereby agrees to indemnify and hold Permittor harmless from and against such costs, fees, interests, charges, expenses, reimbursements, obligations and any interest thereon.

Permittee will also pay without notice, and without abatement, deduction, or set off, except as may be required or permitted by this permit, as additional fees, all sums, taxes, assessments, costs, expenses, and other payments which the Permittee in any of the provisions of this permit assumes or agrees to pay, and in the event of any nonpayment thereof, the Permittor shall have (in addition to all other rights, and remedies) all the rights and remedies provided herein or by law in the event of nonpayment of fees.

8. COVENANT TO PAY FEES

Permittee will pay all fees and additional fees when due, without any setoff or deduction whatsoever, and any payment or receipt thereof by Permittor or its agent of any amount less than the full amount to which Permittor deems it is entitled shall not operate or be deemed to operate as a settlement or satisfaction of said fees or other amounts due, notwithstanding any statement or endorsement on the check or other paper accompanying the payment, but Permittor shall be deemed to have accepted said payment without prejudice and subject to its right to collect the balance actually due, as well as subject to any and all other rights available to Permittor by law and under this permit agreement.

9. LATE PAYMENT

If Permittee does not pay fees or any additional fees hereunder on the day when the same shall become due and payable and such failure to pay fees or any additional fees shall continue for a period of ten (10) days, Permittee shall pay to Permittor, a service charge at the rate of twelve percent (12%) per annum, or the highest rate allowed by law,

whichever is the greater of the amount of such fees or any additional fees or all of them for each month or portion of a month that the same shall remain unpaid; provided, however, that such service charge shall in no event, be less than Fifty Dollars ($50.00) for any month or portion of a month that fees or any additional fees shall remain unpaid. The provisions of this paragraph shall not preclude Permittor from exercising its options as set forth in any other Section of this permit agreement.

10. ELECTRICITY AND VENTILATION

Permittor will allow use of existing electric current for Permittee's needs and allow use of ventilating equipment necessary to exhaust heat generated by illumination of the facility; provided however, that Permittee shall provide all ventilation equipment and modifications, if needed, to electric current solely at its own expense and cost. Permittee agrees that Permittor shall not be liable for any failure to supply electric current or ventilation not due solely to its gross negligence; provided however, that in event of any power failure wherein Permittee is obligated to grant a third-party Advertiser a credit against fees or the cost of electricity consumed, then Permittor shall grant the same credit to Permittee.

Permittee shall give Permittor prompt written notice of any accidents to or defects in electric wires, to be remedied by Permittor with due diligence.

11. TAXES

The Permittee shall pay all taxes, license, certification, permit and examination fees and excises which may be assessed, levied, exacted or imposed on or against the facility or other property of the Permittee or the ownership, possession or use thereof, or on the Permittee's operation hereunder or on the gross receipts or income from such operation, and shall make all applications, reports and returns required in connection therewith.

The obligation to make any payment pursuant to this Article "11" shall survive the expiration, revocation, or termination of the effective period hereof.

Permittee shall, in addition to the foregoing, pay any new tax of a nature not presently in effect or contemplated, but which may be hereafter levied, assessed, or imposed upon the Permittor or the facility, if such tax shall be based on or arise out of the ownership, use, occupation or operation of the facility.

12. LIMITED USE

Permittee shall not use or occupy the facility for any other purpose whatsoever than: commercial advertising.

The statement in this permit as to the nature of the business to be conducted by Permittee in the facility shall not be deemed or construed to constitute a representation or warranty by Permittor that such business that may be conducted in or on the facility is lawful or permissible.

13. MAINTENANCE AND REPAIRS

Permittee has inspected and accepts the facility in its present condition and agrees that no representations or warranties with regard to condition, fitness for use or zoning of facility have been made that are not specifically expressed herein; and further agrees, at Permittee's sole cost and expense, to put and keep the facility in constant good order, repair and safe condition; and further agrees upon the expiration or other termination of this permit, to peaceably quit and deliver control of the facility to Permittor in like good order, repair and safe condition, reasonable wear and tear expected.

Permittee further agrees that upon the termination of this agreement, Permittee shall, at its sole cost and expense, remove from the said facility all fixtures and equipment,

goods and property owned by it and restore the facility to a condition satisfactory to Permittor; in case Permittee shall neglect, or refuse so to do, Permittor shall have the right forthwith to make such removal and restoration at the cost and expense of Permittee, which cost and expense Permittee hereby expressly agrees to pay on demand. and Permittee hereby authorizes Permittor so to do, without being liable to Permittee or to any other person or corporation, for any damage or compensation or to any suit or action for or on account of such removal and restoration.

Permittee further agrees that it shall, at its own cost and expense, assume maintenance of the entire advertising display and supporting structure and all facilities in connection therewith, including, but not limited to ordinary and extra-ordinary maintenance, cleaning, replacement lamps, supervision, all display equipment including transparencies, front lighted copy, lighting equipment and light fixtures, and all special equipment and fixtures required.

Permittee further agrees for itself, its employees and agents, that it will and they will place, remove and arrange materials or property, and in general do any and all work under this agreement, at such times and in such manner as in no way to impede or interfere with the operations of Permittor.

It is expressly agreed that should Permittor at any time at its option make any repairs, renewals or alterations, same shall not constitute a waiver of this covenant "13", or any portion hereof, or of any other provisions of this lease agreement, or of any law or custom pertaining to Permittee's obligations relative to maintenance, repairs, renewals or alterations.

14. COVENANT AGAINST ASSIGNMENT

Permittee shall not assign or transfer this permit in whole or in part, without the prior written consent of Permittor; and Permittee shall not mortgage or otherwise encumber or permit to be encumbered the facility or any part thereof, or any

structures now or hereafter placed on the facility, without the prior written consent of Permittor, and written consent to assign or transfer this permit in whole or in part, or to mortgage or otherwise encumber the facility or any part thereof, or any structures now or hereafter placed on the facility, shall not be deemed as waiving this restriction except to the extent of Permittor's said written consent, or as giving assent to any or further assignment, subletting, mortgaging or encumbrancing. Any assignment or transfer by merger, consolidation, operation of law or proceedings in equity, bankruptcy, insolvency or reorganization, or any other transfer of a controlling interest of the stock of Permittee to persons not now in control, shall be deemed to be an assignment within the meaning of this provision.

The term "assign", as used herein, shall also include (i) an assignment of a part interest in this permit, as well as any assignment from one co-tenant to another; and (ii) an assignment to any prior owner of tenant's interest herein or part thereof.

15. HAZARDOUS USE

Permittee shall comply with all regulations, recommendations, rules and requirements of Permittor, the local board of fire underwriters and any insurance carrier which insures or participates in insuring the facility and Permittee shall not knowingly permit any article to be brought upon or any act to be done upon or about the facility that will cause cancellation of any policy of insurance thereon or increase rates for such insurance beyond those usually charged for similar properties used for the purpose herein authorized.

Without limiting the generality of the foregoing, Permittee shall not use or keep gasoline in any form upon the facility, or bring upon, store or allow to be stored upon the facility any materials of a dangerous or highly flammable nature or of such nature as to cause an extra fire risk or hazard, unless otherwise specifically provided herein, and will comply with

all such reasonable rules and regulations as Permittor may prescribe looking to prevention of fires and compliance with insurance contracts and policies.

Permittee will allow Permittor's Insurance Department Inspectors to periodically inspect the said facility when making any fire inspection of the building which the same is a part.

16. CLEANING AND SANITATION

Permittee shall keep the facility in a clean and sanitary condition, including cleaning of floors, windows and lighting fixtures, and will cause all dirt, rubbish and other refuse matter to be carefully collected and promptly disposed of in a manner satisfactory to Permittor. The removal of said dirt, rubbish and other refuse matter shall be at the expense of Permittee who shall employ only such cleaning, garbage and trash removal contractors as may be approved by Permittor.

17. ORDINANCES

Permittee, at its sole cost and expense, shall comply with and obey all laws, ordinances, rules, regulations and requirements of all Federal, State, Municipal, County, Town, Village or other governmental authorities and the various departments thereof now existing or hereafter created, so far as the same may affect the facility and make any corrections to the facility necessary to comply with said laws, ordinances, rules and regulations and requirements, and will indemnify, defend and save harmless Permittor from any failure on the part of Permittee so to do.

18. SERVICE PERSONNEL

Permittee will provide sufficient personnel to service and maintain the facility.

Permittee's service personnel and those doing business with Permittee shall at all times be neatly dressed, observe all regulations in effect at the facility, and conduct operations in an orderly and proper manner so as not to annoy, disturb or be offensive to others at the facility. In the event Permittor shall object to the demeanor, conduct and appearance of the employees and invitees of the Permittee, and of those doing business with Permittee, Permittee will take all steps necessary to remove the cause of the objection.

19. PARKING

The Permittee, its employees, invitees and others doing business with Permittee shall have no right hereunder to park vehicles at the Station beyond a reasonable loading or discharging time, except in regular parking areas, if any, and upon payment of the regular charges therefor.

All service personnel shall use the designated service entrance and park service vehicles in the designated areas, if any.

20. SIGNS AND ADVERTISING

Permittee shall not paint, post or display any sign or advertisement on the said facility without the prior written approval of Permittor and requirement for such approval shall extend to the location, character, design, coloring and lettering of such sign or advertisement.

21. ALTERATIONS AND REMOVALS

Permittee shall not make any alterations, additions or improvements on or to the facility without the prior written consent of Permittor, and all alterations, additions or improvements which may be made by either Permittor or Permittee upon the facility, unless herein otherwise provided, and

except the personal property of Permittee which includes movable furniture, furnishings, and equipment shall be property of Permittor and shall remain upon and be surrendered with the facility as part thereof at the expiration or other termination of this permit without disturbance, molestation or injury.

22. PERMITTEE'S RESPONSIBILITY TO ITS EMPLOYEES

Permittee, in the performance of any and all work by Permittee under the terms of this permit or otherwise, upon or adjacent to the facility, will furnish all labor and supervisory forces of every kind and Permittee shall employ, pay from Permittee's own funds and have the right to discharge all persons engaged in the performance of such work and all such persons shall be and remain the sole employees of Permittee and subject to Permittee's exclusive supervision, direction and control.

23. LIENS AND CHARGES

Permittee, within thirty (30) days after completion of any construction, alterations, repair or improvement in or upon the facility, shall furnish to Permittor, a detailed certified statement of all labor and materials furnished and charges therefor, together with evidence of payment of all such charges, and a complete waiver and release of liens.

The creation or imposition of any lien or charge upon the demised premises through acts or omissions of Permittee, its agents, contractors or sub-contractors shall be deemed a default under the provisions of this permit.

In the event any such lien or charge shall not be paid or bonded by Permittee within fifteen (15) days after the lien or charge accrues, Permittor shall have the right to pay such lien or charge and Permittee shall repay the cost to Permittor, as additional fees hereunder, with interest at twelve percent

(12%) per annum or the highest interest allowable by law, whichever is the greater from the date of payment by Permittor, promptly upon rendition of a bill therefor. Nothing in this paragraph or in any other paragraph of this permit shall be deemed or construed as authority to Permittee to create any lien on the Permittor's interest in the facility.

24. INDEMNIFICATION

Permittee will be responsible for and will indemnify, save harmless and defend Permittor against and from any and all claims and suits for, and any and all liability, loss or expense arising from or incidental to or in connection with, damage to or loss of property of Permittor, Permittee, or of agents, servants, licensees, contractors, invitees or employees of either, or of any other person, and against and from any and all claims and suits for, and any and all liability, loss or expense arising from or incidental to or in connection with, injury to or death of persons, including agents, servants, contractors, licensees, invitees or employees of Permittor or of Permittee, or any other person (including Permittee if a natural person), which said damage, loss, injury or death shall arise in any manner, directly or indirectly, out of or incidental to or in connection with, this permit or the facility, or the use or occupation thereof, including any appurtenant sidewalks or driveways.

Permittee specifically agrees to relieve Permittor of any and all liability for damage to contents of the facility owned by or in the custody of Permittee, or improvements therein owned by or in the custody of Permittee, whether damaged by fire and extended coverage perils or other causes.

The term "Permittor" as used in this Section "24", shall include not only Permittor specifically named herein, but also any licensees, contractors or corporate affiliate of Permittor.

25. LOSS OR DAMAGE

Permittor shall not be liable to Permittee for any loss, injury or damage which may happen to the person (if Permittee is natural person) or property of Permittee, of Permittee's employees or of persons claiming under Permittee, while on or about the facility, caused by theft, fire, or by the handling of electrical installations, or by accident to or breakage of any of the machinery, piping or plumbing, fixtures or other appurtenances connected with any building or by water, rain or snow which may leak into, issue or overflow from any part of any such building.

26. INSURANCE

Permittee shall, at its own expense, procure and keep in force at all times during the term of this permit, insurance of the following types and amounts: Comprehensive Public Liability insurance in an amount of not less than Five Hundred Thousand Dollars ($500,000.) for personal injury to any one person; One Million Dollars ($1,000,000.) for personal injuries arising out of any one accident or occurrence and One Hundred Thousand Dollars ($100,000.) for property damage.

Permittee, if requested by Permittor at any time or times, shall provide and maintain in effect during the term hereof, fire and extended coverage and vandalism and malicious mischief insurance on the facility and any and all structures and improvements thereon, protecting Permittor in limits, carriers and form acceptable to Permittor and Permittee shall also provide and maintain in effect during the term hereof, coverage against such other hazards as Permittor may from time to time require.

All insurance shall be in the name of Permittee with contractual liability endorsement identifying the permit location, principals, date, and quoting verbatim the liability assumed by Permittee. The insurance shall be placed with insurance

companies licensed to do business in the state where the facility is located and if approved by Permittor. Permittee shall furnish Permittor with a certificate, or certificates, issued by the insurance carrier(s) evidencing such insurance including a waiver of subrogation against Permittor and reciting the contractual liability assumed by Permittee. Each policy shall provide that it shall not be cancelled or materially changed unless at least thirty (30) days' prior written notice of cancellation or change shall have been mailed by the insurance carrier to Permittor at the address designed in Article "4" hereof. All policies of insurance shall be subject to inspection by Permittor at any time.

Policy or policies of fire, extended coverage or other insurance on property of Permittee or in the Permittee's care and custody shall contain a waiver of subrogation against Permittor.

Permittee shall furnish to Permittor complete copies of all such insurance policies with evidence of payment of premiums therefor upon request of Permittor. All such policies shall be endorsed to provide not less than thirty (30) days' notice to Permittor of any cancellation thereof and of any material change in coverage.

The providing of said insurance coverages shall not be deemed a limitation on the liability of Permittee as provided in this permit, but shall be additional security therefor.

Each and every year on the First (1st) day of January, Permittee shall furnish Permittor with a certificate or certificates, issued by the insurance carrier(s) with evidence of payments of premium(s).

The failure by the Permittee at any time to procure and/or maintain the above stated insurance will constitute a default under Article "31" hereof and Permittor may terminate this permit.

27. THIRD-PARTY ADVERTISEMENTS

Before any binding contract is entered into and any advertisement is emplaced or installed, Permittee shall submit all third-party advertisements to the Permittor for its written approval of the following: the size or dimension, nature of product to be advertised, form, nature, style, wording and contents of the advertisement.

Without limiting the scope of its right to disapprove any advertising which Permittor in its sole judgment considers should not be accepted or installed by Permittee, Permittor makes the reservations contained herein to preclude any advertising that, in its judgment, may be unlawful, immoral, improper or offensive to good taste, or be in competition directly or indirectly with the transportation conducted by Permittor or its affiliated companies; or involve political or other views which could result in dissension or involve Permittor in dissension, complaints or controversy with its patrons or the public or involve matters or ramifications not now anticipated or foreseeable.

Permittee shall provide in its contracts with its third-party advertisers that notwithstanding the fact that Permittor and Permittee may have permitted the advertising to be placed on Permittor's property as herein provided, Permittor has reserved the right and shall have the right to cause to be removed forthwith without liability to Permittee or its third-party advertiser any advertisement which in the judgment of Permittor is or might be deemed to be slanderous, libelous, unlawful, immoral, offensive to good taste, involves illegal competition or trade practices, infringement of trademarks, trade names, violates rights or privacy, infringement of copyrights or proprietary rights.

Permittee, as part of its obligation under Article "26" to provide insurance against liability of Permittor, shall in addition thereto provide insurance against any action against itself or Permittor in the nature of defamation, libel, slander,

invasion of privacy or the like in the same amounts and under the same conditions as provided in Article "26"

28. FIRE CLAUSE

If the facility and/or the location(s) wherein the equipment is placed or installed shall be so damaged by fire or other cause without the fault or neglect of Permittee, Permittee's servants, employees, or agents, so as to render the facility and/or the location(s) unuseable for Permittee's operations, then either party may terminate or revoke, this permit upon ten (10) days' prior written notice to the other, and neither party shall incur any liability or have any claims against the other by reason of such termination except for such sums due and owing to Permittor from Permittee prior to the date of termination or revocation; provided, however, if such damage is due to the fault of Permittee, Permittee's servants, employees, or agents, the damage shall be repaired by or at the Permittee's expense and fees payable during the period of disrepair shall not be less than the average monthly fees due or paid Permittor over the preceding six-month period.

29. CONDEMNATION

If the whole or any part of the facility shall be taken for any public or quasi-public use, under any statute or by right of eminent domain or private purchase in lieu thereof by a public body vested with the power of eminent domain, then, when control shall be taken thereunder of the facility, or any part thereof, the term herein granted and all rights of the Permittee hereunder shall immediately terminate, and Permittee shall have no claim against Permittor for the value of any unexpired term of this permit.

30. DEFINITIONS

The word "Permittee" as used herein shall be construed to include the plural as well as the singular and the necessary grammatical changes required to make the provisions hereof apply either to corporations or other forms of business association or to an individual or individuals, masculine or feminine, in all cases shall be assumed as having been made herein as though herein fully expressed.

The term "Permittor" as used in this permit, means only the owner or the mortgagee in possession for the time being of the land and building (or the owner of a lease of the building or of the land and building) of which the facility forms a part so that in the event of any sale or sales of said land and building or of said permit, or in the event of a lease of said building, or of the land and building, the said Permittor shall be and hereby is entirely freed and relieved of all covenants and obligations of Permittee hereunder.

The words "re-enter" and "re-entry" as used in this permit are not restricted to their technical legal meaning.

The word "period" as used in this permit shall include any preliminary period and/or any extension, renewal, or continued period or periods except where expressly excluded.

The term "permit year" as used herein shall be the period of one year's duration commencing on the first day when Permittee becomes obligated to pay fees and each successive period of one year's duration commencing on the anniversary of the first day when Permittee becomes obligated to pay fees.

The term "additional fees" as used herein shall be all costs and expenses other than fixed fees which Permittee assumes or agrees to pay pursuant to this permit.

31. DEFAULT

If default shall be made in Permittee's covenants herein to pay fees or additional fees, or if default shall be made in any other covenants and agreements herein contained on the part

of Permittee to be kept or performed, and if any such default shall not be cured within thirty (30) days after Permittee has been given written notice by Permittee to do so, or if the facility shall not be used by Permittee for the purposes herein authorized for a period of more than thirty (30) days, or if the facility should at any time be used for purposes other than as herein permitted, or if Permittee shall file or suffer to be filed against it a petition in bankruptcy, or if Permittee shall have an order for relief entered against it according to bankruptcy law, or if a receiver or trustee be appointed for the property of Permittee, or if Permittee shall make a general assignment for the benefit of creditors, then, in any of such cases, Permittor may, by written notice to Permittee immediately declare this permit terminated, and in such event, in addition to any other action or remedy which Permittor may have at law or in equity to recover damages or otherwise by reason of a breach by Permittee of provisions of this permit, Permittor shall have the right to remove Permittee by summary proceedings and thereafter Permittor may re-enter upon and take control of the facility and every part thereof, either by force or otherwise, without being liable to any prosecution, action or damages therefor and have and enjoy the facility as of its former estate free, clear and discharged of this permit and of all rights of Permittee hereunder; and all buildings, structures, improvements, materials and personal property owned, erected or placed upon the facility by or for Permittee or acquired by Permittee from a prior occupant, shall thereupon be and become the property of Permittor and may be sold or retained by Permittor or may be removed or demolished by Permittor at the sole cost and expense of Permittee, which cost and expense Permittee shall pay to Permittor upon demand; and Permittee also shall pay to Permittor upon demand all fees and expenses, including reasonable attorneys fees, incurred in connection with and in obtaining control of the facility as aforesaid.

Upon termination of this permit by Permittor under the default provisions of this permit agreement, all fees for the

remainder of the term of this permit, or for the remainder of any continued term hereof, shall be due and payable forthwith and Permittor may proceed according to law to collect the same and may subcontract the facility and receive and retain fees therefor and Permittee shall pay to Permittor any deficiency between the fees hereby reserved, including additional fees, and the fees collected for each month of the period which would otherwise have constituted the balance of the term of this permit or of any continued term hereof.

The receipt by or on behalf of Permittee of any fees or additional fees with or without knowledge of any breach of any of the terms, covenants or conditions of this permit agreement, shall not be deemed a waiver of such breach, nor shall such receipt be deemed a withdrawal of any notice given to Permittee under the terms of this permit agreement, nor shall such receipt be deemed a reinstatement or reestablishment of this permit or any portion thereof after termination or cancellation, nor shall the termination or other cancellation of this permit agreement or any portion thereof waive the obligation of Permittee to pay or discharge any fees, additional fees, taxes or other obligations accruing under this permit agreement.

Permittee hereby waives and relinquishes unto and in favor of Permittor the operation of all laws which do now or hereafter may exempt any property on the facility or any property in any way belonging to Permittee, whether on the facility or elsewhere, from levy and sale upon distress for rent or upon execution of any judgment obtained in an action brought for non-payment of any fees or additional fees hereunder or for breach of any other provisions hereof. The parties hereto shall and do hereby waive trial by jury in any action, proceeding or counter-claim brought by either party against the other on any matter whatsoever arising out of or in any way connected with this permit or Permittee's use of and occupancy of the facility or arising out of or in any way connected with any claim of injury or damage arising out of or in connection with this permit or such use or control. Permittee hereby expressly

waives any and all rights of redemption granted by or under any present or future laws in the event of Permittee being evicted or dispossessed for any cause or in the event of Permittor obtaining control of facility by reason of the violation by Permittee of any of the covenants and conditions of this permit or otherwise.

32. REMOVAL

Upon the expiration of the term hereof, or upon any other termination of this permit for reasons other than default on the part of Permittee, or upon default if required by Permittor, Permittee at sole cost and expense, shall remove from the facility any materials not owned by Permittor, and all waste, rubbish and debris; and restore the premises to as good condition as they were in before such property was erected or placed thereon; and all such work of removal and restoration shall be completed on or before the expiration or other termination of this permit. Should Permittee fail, neglect or refuse to so remove such property and make the aforesaid restoration, then and in such event Permittor shall have the following rights, which are hereby expressly given it, viz.: to remove such property and to make the aforesaid restoration, all at the expense of Permittee, which expense Permittee hereby expressly agrees to pay promptly upon demand, or to sell any of such property and retain the proceeds of such sale and to deliver such property to the purchaser or purchasers thereof free and clear of any right, title or interest therein of Permittee or of any person or corporation claiming through or under Permittee or of any person or corporation claiming through or under Permittee and without any liability whatsoever to Permittee or to any other person or corporation; or, if Permittor so elects, in lieu of such sale or removal of any of such property, Permittor may retain and use the same for any purpose whatsoever free and clear of any right, title or interest therein of Permittee or of any person or corporation claim-

ing through or under Permittee and without any liability whatsoever to Permittee or to any other person or corporation.

33. DEFAULT REMEDIES

The actions and remedies provided in this permit in event of default shall not be deemed exclusive but shall be in addition to all other actions and remedies at law or in equity in event of any such default; and no action or remedy taken or omitted by Permittor in event of default shall be deemed a waiver of such default and waiver of a particular default shall not be deemed a waiver of any other default or a waiver of the same default again occurring, nor shall any failure on the part Permittor to compel a fulfillment of any one or more of the covenants, terms and conditions herein contained be held to be a waiver of its right to enforce the same at any time thereafter during the term of this permit.

34. EQUAL OPPORTUNITY AFFIRMATIVE ACTION: NON-DISCRIMINATION

During the term of this permit the Permittee covenants and agrees to conform and comply (where and when applicable) with each and every term and condition outlined on Exhibits "A", and "B" which are attached hereto and made a part hereof. The terms "Permittor" and "Permittee" shall be substituted for "Lessor" and "Lessee," respectively, whenever the same appear in Exhibits "A" and "B". It is agreed that the Permittee's non-compliance with the provisions of this clause shall constitute a default under Article "31" hereof and the Permittor may terminate this permit, or may pursue such other remedies as may be provided by law.

35. INABILITY TO PERFORM

This permit and obligation of Permittee to pay fees and/or additional fees hereunder and to keep and perform all other

covenants and agreements hereunder on part of Permittee to be kept or performed shall in no way be affected, impaired, or excused because Permittor is unable to fulfill any of its obligations under this permit, or is unable to supply, or because Permittor is delayed in supplying any service expressly or impliedly to be supplied by Permittor, or is unable to perform, or because Permittor is delayed in performing, any work or service for which it is liable hereunder, if Permittor is prevented or delayed from so doing by reason of labor troubles or any outside cause beyond control of Permittor, including, but not limited to, governmental action or preemption, act of God, war or civil commotion or unrest.

36. SUBORDINATION

This permit is subject and subordinate to any and all ground or underlying leases and to any and all mortgages which may now or hereafter affect such leases or the real property of which the facility forms a part, and to all renewals, modifications, consolidations, replacements and extensions thereof. This clause shall be self-operative and no further instrument of subordination shall be required by any mortgagee; however, in confirmation of such subordination, Permittee shall execute promptly any certificate to that effect upon request by Permittor. Permittee hereby constitutes and appoints Permittor as Permittee's attorney-in-fact to execute any such certificate or certificates for and on behalf of Permittee.

37. SUCCESSORS AND ASSIGNS

The covenants and agreements herein contained shall inure to the benefit of and be binding upon the successors, heirs, executors, administrators, and assigns of the parties hereto respectively, provided, however, that this permit shall not be assigned by Permittee without the prior written consent of Permittor.

38. NOTICES

Except as otherwise in this permit provided, a bill, statement, notice or communication which Permittor may desire, or be required to give to Permittee, shall be sufficiently given or rendered if in writing, delivered to Permittee personally or sent by registered or certified mail addressed to Permittee at 275 Madison Avenue, New York, New York 10016 or at any such address as Permittee shall designate by written notice, and the time of the rendition of such bill or statement and of the giving of such notice or communication shall be deemed to be the time when the same is delivered to Permittee, or mailed, as herein provided. Any notice by Permittee to Permittor must be sent by registered or certified mail addressed to National Railroad Passenger Corporation, Real Estate Department at 400 North Capitol Street, N.W., Washington, D. C. 20001 or at any such other address as Permittor may designate by written notice.

39. INTEGRATION

No change or modification of any of the covenants, terms or provisions hereof shall be valid unless in writing and signed by the parties hereto.

There are no understandings or agreements of any kind between the parties hereto, verbal or otherwise, other than as set forth in this permit.

This permit, including exhibits, if any, constitutes the entire agreement between Permittor and the Permittee on the subject matter hereof.

40. NOT A JOINT VENTURE

This permit shall not be deemed or construed as appointing the Permittee, the agent or representative of Permittor for any purpose whatsoever. Neither a partnership nor any joint venture is hereby created, notwithstanding the fact that all or a

portion of the fees to be paid hereunder may be determined by gross receipts from the operations of the Permittee hereunder.

41. NO WAIVER

The failure of Permittor to seek redress for violation of, or to insist upon the strict performance of, any covenant or condition of this permit, or any of the Rules and Regulations hereinafter adopted by Permittor shall not prevent a subsequent act, which would have originally constituted a violation, from having all the force and effect of an original violation. The receipt by Permittor of fees with knowledge of the breach of any covenant of this permit shall not be deemed a waiver of such breach.

42. RULES AND REGULATIONS

The Permittee shall observe and obey (and compel its officers, employees, guests, invitees, and those doing business with it to observe and obey) the rules and regulations of Permittor now in effect, if any, and such further rules and regulations which may from time to time during the effective period of this permit, be promulgated by Permittor.

43. SEVERABILITY

The provisions of this permit are severable and it is the intention of the parties hereto that if this permit cannot take effect in its entirety because of the final judgment of any court of competent jurisdiction holding invalid any part or parts thereof, the remaining provisions of the lease shall be given full force and effect as completely as if the part or parts held invalid had not been included therein.

44. PARAGRAPH CAPTIONS

Paragraph captions used herein are placed for reading convenience and shall not have any other meaning, implication or purpose, legal or otherwise.

45. EXTENT REQUIRED BY LAW

To the extent required by law, this permit shall be subject to the approval, if necessary, of any State Commerce Commission, Board of Public Utility Commissioners, Public Service Commission or any such State body as may have jurisdiction.

46. NOT STRICTLY CONSTRUED

This permit shall not be strictly construed against the Permittor or Permittee. No remedy or election given by any provision of this permit shall be deemed exclusive unless so indicated, but each shall, wherever possible, be cumulative with all other remedies in law or equity unless otherwise specifically provided. Each provision hereof shall be deemed both a covenant and a condition and shall run with the land.

47. WORDS OF OBLIGATION

Whenever in this permit agreement any words of obligation or duty are used, such words or expressions shall have the same force and effect as though made in the form of covenants.

48. FORCE MAJEURE

This obligation of the Permittor hereunder shall be subject to Force Majeure which shall include but not be limited to labor troubles.

49. LAW GOVERNING

This agreement shall be governed by the laws of the District of Columbia.

50. TIME OF THE ESSENCE

Time and specific performance are each of the essence in this permit.

51. ENVIRONMENTAL

Permittee shall comply with all environmental regulations issued by Federal, State or Local Environmental Agencies, hereinafter called "Agencies", and shall maintain the facility according to environmental standards set by such agencies, including, but not limited to, water, air and noise standards. In the event Permittee fails to maintain the facility according to standards set by an agency and if, after giving reasonable notice of the failure to Permittee, Permittor acts to bring the facility into compliance, Permittee shall repay Permittor for all costs incurred by Permittor in abating a violation of such standards, and paying any fine or assessment levied as a result of violation of such standards, including, but not limited to, consulting, engineering, construction and legal costs. Permittee shall further indemnify, defend and save harmless Permittor from any claim of a violation of environmental standards resulting from Permittor's use of the facility, whether brought by an agency, a private citizen, or in a court procedure; and Permittee shall, at its cost, respond to all such claims for its benefit and for the benefit of Permittor.

52. REFUND

In the event of termination of this permit by Permittor for any cause other than default or failure to comply with the

terms of this permit by Permittee and if fees shall have been paid by Permittee in advance to a day subsequent to the date of such termination of this permit, then Permittor shall refund and repay to Permittee and Permittee shall receive and accept as full payment for all loss, damages, and demands occasioned by such termination of this permit, the apportioned amount of the term so avoided, except that no refund will be made of any amount less than Fifty Dollars ($50.00). Permittee shall remain liable for the payment of real estate taxes and other charges assessed or imposed upon Permittee's buildings or improvements or in connection therewith which may have accrued to date of such termination, and other taxes and assessments which Permittee is obligated to pay as additional fees hereunder shall be prorated to the date of termination.

Permittor shall not be obligated to reimburse Permittee for any expenditure by Permittee for construction of improvements, or for alterations, on or to the facility and Permittee hereby expressly waives any claim against Permittor for such reimbursement.

53. EXECUTION OF AGREEMENT BY LESSOR

It is understood and agreed between the parties hereto that execution of this Agreement by Permittee, and negotiation of any check or other negotiable instrument by Permittor, prior to the date of execution of this agreement by Permittor, shall in no way be deemed or construed by Permittee to be acceptance of this agreement by Permittor. In the event that this agreement is not executed by Permittor for any reason whatsoever, then and in that event the amount set forth in any such check or other negotiable instrument shall be refunded to Permittee within a reasonable period of time after written notification that this agreement will not be executed by Permittor; provided, however, that the payment by Permittee of a preparation fee, if any, to Permittor shall be nonrefundable and made as full payment for the Permittor's preparation

of this document without regard to whether or not same is ever executed.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed by their proper officers, thereto duly authorized, day and year first above written.

WITNESS:

R. HAGLER

NATIONAL RAILROAD PASSENGER CORPORATION

BY: KURT WEISSHEIMER

Kurt Weissheimer

TITLE: *Assistant Vice President–Real Estate*

WITNESS:

BERTON MILLER

TRANSPORTATION DISPLAYS, INC.

BY: JULIAN G. PIZZANO

TITLE: *Executive Vice President/General Manager*

EXHIBIT 'A'

EQUAL OPPORTUNITY

During the performance of this Agreement, the Lessee agrees as follows:

(a) The Lessee will not discriminate against any employee or applicant for employment because of race, color, religion, sex, age, or national origin. The Lessee will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, age, or national origin. Such action shall include, but not be limited to, the following; employment, upgrading, demotion, or transfer; recruitment or recruitment adverting; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Lessee agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provision of this Equal Opportunity clause.

(b) The Lessee will, in all solicitations or advertisements for employees placed by or on behalf of the Lessee, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, age, or national origin.

(c) The Lessee will send to each labor union or representative of workers with which lessee has a collective bargaining agreement or other contract or understanding, a notice advising the labor union or workers representative of the Lessee's commitments under this Equal Opportunity clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Lessee will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and of the

rules, regulations and relevant orders for the Secretary of Labor.

(e) The Lessee will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965 as amended by Executive Order No. 11375 of October 13, 1967, and by the rules, regulations and orders of the Secretary of Labor, and pursuant thereto and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

(f) In the event of the Lessee's noncompliance with the Equal Opportunity clause of this Agreement or with any of the said rules, regulations, or orders, this Agreement may be canceled, terminated, or suspended, in whole or in part, and the Lessee may be declared ineligible for further contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965 as amended by Executive Order No. 11375 of October 13, 1967, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(g) The Lessee will include the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, so that such provisions will be binding upon each subcontractor or vendor. The Lessee will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: provided, however, that in the event the Lessee becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Lessee may request the United States to enter into such litigation with a subcontractor or vendor as

a result of such direction by the contracting agency, the Lessee may request the United States to enter into such litigation to protect the interests of the United States.

EXHIBIT 'B'

AFFIRMATIVE ACTION

(a) The Lessee agrees to use its best efforts to achieve minority employment within its total work force, including its associates and subcontractors. For purposes of this clause, (a) "minority employment" means employment of minority group members as hereinafter defined.

(b) The Lessee agrees to use its best efforts to carry out this policy in the award of its subcontracts, if any, to the fullest extent consistent with the efficient performance of this Agreement. As used herein, the term "minority business enterprise" means a business organization having at least fifty (50%) percent of its equity (exclusive of any equity interest held by any governmental agency) owned by minority group persons, or where less than fifty (50%) percent, the organization is controlled by such persons or such other organizations as the Amtrak determines to be a bona-fide minority business organization.

(c) The Lessee shall meet the requirements of 49CFR 265.7 which are as follows:

(1) As a condition to receiving Federal financial assistance under the Railroad Revitalization and Regulatory Reform Act of 1976 ("Act"), or the provisions of the Regional Rail Reorganization Act of 1973, as amended (45 U.S.C. 701 et. seq.) or the Rail Passenger Service Act of 1970 as amended (45 U.S.C. 501 et. seq.) amended by the Act, (collectively called, together with the Act, the "Rails Acts"), the Lessee hereby agrees to observe and comply with the following:

(i) No person in the United States shall on the grounds of race, color, national origin, age, or sex be excluded from participation in, or denied the benefits of, or be subjected to discrimination under, any project, program, or activity funded in whole or in part through such assistance.

(2) The following specific discriminatory actions are prohibited:

(i) A Lessee under any project, program or activity to which these clauses apply shall not, directly or through contractual or other arrangements, on the grounds of race, color, national origin, age, or sex:

(A) Deny a person any service, financial aid, or other benefit provided under such project, program or activity;

(B) Provide any service, financial aid, or other benefit to a person which is different, or is provided in a different manner, from that provided to others under such project, program or activity;

(C) Subject a person to segregation or separate treatment in any matter related to his receipt of any service, financial aid or other benefit under such project, program and activity;

(D) Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid or other benefit under such project, program or activity;

(E) Deny a person an opportunity to participate in such project, program or activity through the provision of services or otherwise or afford him/her an opportunity to do so which is different from that afforded others under such project, program or activity.

(ii) A Lessee, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such project, program or activity or the class of persons to whom, or the situations in which such services, financial aid, other benefits, or facilities will be provided under any such project, program or activity, or the class of persons to be afforded an opportunity to participate in any such project, program or activity shall not, directly or through contractual or other arrangements, utilize criteria or methods

of administration which have the effects of subjecting persons to discrimination because of their race, color, national origin, age, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the project, program or activity, with respect to individuals of a particular race, color, national origin, age, or sex.

(iii) In determining the site or location of facilities, a Lessee shall not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any project, program or activity to which these clauses apply on the grounds of race, color, national origin, age, or sex, or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of these clauses.

(iv) The Lessee shall not discriminate against any employee or applicant for employment because of race, color, national origin, age, or sex. Except as otherwise required by the regulations or orders of Lessor, the Lessee shall take affirmative action to insure that applicants for employment are employed, and that employees are treated during employment, without regard to their race, color, national origin, age, or sex. Such action shall include, but not be limited to, the following: employment, promotion, demotion, transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. The Lessee agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of these nondiscrimination clauses. The Lessee understands and agrees that it shall not be an excuse for the Lessee's failure to provide affirmative action that the labor organizations with which the Lessee has a collective bargaining agreement failed or refused to admit or qualify minorities for admission to the union, or that the provisions of such agreements otherwise prevent Lessee from implementing its affirmative action program.

(V) The Lessee shall not discriminate against any business organization in the award of any contract because of race, color, national origin, age, or sex of its employees, managers or owners. Except as otherwise required by the regulations or orders of the Lessor, the Lessee shall take affirmative action to insure that business organizations are permitted to compete and are considered for awards of contracts without regard to race, color, national origin, age, or sex.

(3) As used in these clauses, the services, financial aid, or other benefits provided under a project, program, or activity receiving financial assistance under the Rail Acts include any service, financial aid, or other benefit provided in or through a facility funded through financial assistance provided under the Rail Acts.

(4) The enumeration of specific forms of prohibited discrimination does not limit the generality of the prohibition in paragraph (a)(1)(i) of this section.

(5) These clauses do not prohibit the consideration of race, color, national origin, age, or sex if the purpose and effect are to receive or overcome the consequences of practices or impediments which have restricted the availability of, or participation in Lessee's operations or activities on the grounds of race, color, national origin, age, or sex. Where prior discriminatory or other practice or usage tends, on the grounds of race, color, national origin, age, or sex, to exclude individuals or businesses from participation in, to deny them the benefits of, or to subject them to discrimination under any project, program or activity to which these clauses apply, the Lessee must take affirmative action to remove or overcome the effect of the prior discriminatory practice or usage. Even in the absence of prior discriminatory practice or usage to which this part applies, the Lessee is expected to take affirmative action to insure that no person is excluded from participation in or denied the benefits of the project, program or activity on the grounds of race, color, national origin or sex,

and that minorities and minority businesses are afforded a reasonable opportunity to participate in employment and procurement opportunities that will result from financial assistance provided under the Rail Acts.

(6) The Lessee agrees to take such actions as are necessary to monitor its activities and those of its contractors who will be paid in whole or in part with funds provided by the Rail Acts, or from obligations guaranteed by Lessor pursuant to the Rail Acts, except obligations guaranteed under section 602 of the Rail Passenger Service Act, in order to carry out affirmatively the purposes of paragraph (1) above, and to implement the affirmative action program developed and implemented pursuant to 49 CFR 265.

(7) The Lessee shall, in all advertisements for employees, or solicitations for services or materials from business organizations placed by or on behalf of the Lessee, in connection with any project, program or activities funded in whole or in part with financial assistance under the Rail Acts, state that all applicants for employment will receive consideration for employment, and all business organizations will receive consideration for an award of a contract, without regard to race, color, national origin, age, or sex.

(8) The Lessee shall send to each labor organization or representative of workers with which it has a collective bargaining agreement or other contract or understanding a notice to be provided by the agency's representative, advising the labor organization or workers' representative of the Lessee's commitments under section 905 of the Act, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(9) The Lessee shall comply with all provisions of section 905 of the Act, the Civil Rights Act of 1964, any other Federal Civil Rights Act, and with the rules, regulations, and orders issued under such acts.

(10) The Lessee shall furnish all information and reports required by the rules, regulations, and orders of the Lessor, and will permit access to its books, records, and accounts by Lessor or any Federal agency, including the general accounting office which has the right to audit Lessor's accounts for purposes of investigation to ascertain compliance with rules, regulations, and orders referred to in paragraph (9) hereof.

(11) Lessee shall furnish such relevant procurement information, not included in its affirmative action program, as may be requested by the Minority Business Resource Center. Upon the request of the Lessee, the Center shall keep such information confidential to the extent necessary to protect commercial or financial information or trade secrets to the extent permitted by law.

(12) In the event of the Lessee's noncompliance with the nondiscrimination clauses of this Agreement, or with the provisions of section 905 of the Act, the Civil Rights Act of 1964, or with any other Federal Civil Rights Act or with any rules, regulations, or orders issued under such acts, this Agreement will, after notice of such noncompliance, be canceled, terminated, or suspended in whole or in part and the Lessee may be declared ineligible for further Federal financial assistance in accordance with procedures authorized in section 905 of the Act, or as otherwise provided by law.

(13) The Lessee shall not enter into any contract or contract modification whether for the furnishing of supplies or services or for the use of real or personal property, including lease arrangements or for construction in connection with a project, program or activity which receives financial assistance under the Rails Act with a Contractor debarred from or who has not demonstrated eligibility for Federal or federally assisted contracts, and will carry out such sanctions and penalties for violation of this part as may be imposed upon contractors and subcontractors by any authorized Federal official. The Lessee shall insure that the clauses required by

41 CFR 60 1.46 implementing Executive Order No. 11246 will be placed in each non-exempt federally assisted construction contract.

(14) The Lessee agrees to comply with and implement the written affirmative action program as approved by Lessor pursuant to section 265.17 of Title 49 CFR.

(15) The Lessee agrees to notify Lessor promptly of any suit or complaint filed against the Lessee alleging discrimination on the basis of race, color, national origin, age, or sex. the Lessee shall include the preceding provisions of paragraphs (a) through (d) in every contract or purchase order, whether for the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, or for construction relating to projects, programs or activities financed in whole or in part under the Rail Acts. The Lessee shall cause each such contractor or vendor to include the provisions of paragraphs (a) through (d) in every subcontract. The Lessee will take such action with respect to any such contract or purchase order as Lessor may direct as a means of enforcing such provisions including sanctions of noncompliance; provided, however, that in the event the Lessee becomes involved in, or is threatened with, litigation with a contractor or vendor as a result of such direction by Lessor, the Lessee may request the United States to enter into such litigation.

PLAINTIFF'S EXHIBIT 6

[LETTERHEAD OF AMTRAK]

December 23, 1992

Tina Kowalsky Haut, Esq.
Sr. Vice President/General Counsel
Transportation Displays Incorporated
275 Madison Avenue
New York, NY 10016

Dear Ms. Haut:

Pursuant to Section 6 of the License Agreement between the National Railroad Passenger Corporation ("Amtrak") and Transportation Displays Incorporated ("TDI") dated March 15, 1991, Amtrak hereby notifies TDI that it cannot accept the advertising proposed for the Penn Station, New York spectacular advertising sign beginning January 1, 1993. Amtrak's policy is that it will not allow political advertising on the spectacular advertising sign.

Sincerely,

/s/ TONY DEANGELO
Tony DeAngelo
Vice President-Real Estate and
Operations Development

PLAINTIFF'S EXHIBIT 7

NATIONAL RAILROAD PASSENGER CORPORATION

1991 ANNUAL REPORT

FIVE-YEAR COMPARISON OF PERFORMANCE

	1991	1990	1989	1988	1987
Revenues (millions)	**$1,359.0**	$1,308.4	$1,269.1	$1,106.7	$ 973.5
Expenses (millions)	**$2,080.5**	$2,011.18	$1,934.5	$1,757.1	$1,672.0
Revenue-to-Expense Ratio	**.79***	.72	.72	.69	.65
Revenue-to-Shot-Term Avoidable Cost Ratio**	**1.23**	1.20	1.20	1.15	1.03
Revenue-to-Long-Term Avoidable Cost Ratio***	**.96**	.93	.91	.90	.79
Passenger Miles (millions)****	**6,273**	6,057	5,859	5,678	5,221
Passenger Miles per Train-Mile****	**184.5**	183.3	188.4	188.3	176.8
System On-Time Performance	**77%**	76%	75%	71%	74%
Ridership (millions)					
Amtrak System	**22.0**	22.2	21.4	21.5	20.4
Contract Commuter	**18.1**	18.0	17.4	15.4	10.2
Total	**40.1**	40.2	38.8	36.9	30.6

* Beginning in fiscal year 1991, the methodology of computing this ratio was changed to reflect the exclusion of excess Railroad Retirement and Unemployment Insurance Taxes which are now paid directly to the Internal Revenue Service by the Federal Railroad Administration on behalf of Amtrak. This change resulted in an increase of .06.

** Short-term avoidable costs—Costs of activities that would stop with the discontinuance of a route or train, or begin with the introduction of a new route or train. Such costs include train and engine crews, fuel and power, and maintenance of way.

*** Long-term avoidable costs—All short-term avoidable costs, plus claims expenses, heavy maintenance, and a portion of corporate and field overhead.

**** Contract commuter passengers not included.

* * *

PRESIDENT'S REPORT

* * *

What a dramatic change there has been in public perceptions about rail passenger service. From a dying industry, Amtrak is now recognized to be a vital part of the nation's transportation solution—an energy-efficient mode capable of reducing automobile and airport congestion and of assisting states and regions in meeting tough new air quality standards.

Far more important than perceptions, however, is the real growth we have seen in many segments of our business. Despite a very weak national economy during 1991, and a struggling travel industry, we posted modest increases in passenger miles and revenues. Admittedly, growth was well below projections, but not even the most pessimistic economists foresaw a recession of the kind we have witnessed. Yet, compared to the air industry that saw billion dollar losses and continued bankruptcies, Amtrak improved our revenue-to-cost ratio, increased our share of the Northeast Corridor travel market, and initiated a number of new, innovative services. Although we still required an operating subsidy to cover some $343 million in operating losses, we remain optimistic that we can meet our goal of eliminating the need for operating support by the end of this decade.

* * *

During the 1950s and 1960s, I had the misfortune to watch the slow demise of rail passenger service in this country, and more recently have had the opportunity to witness, and perhaps assist in, its resurrection. I am proud and deeply appreciative of the Amtrak employees who made this rebirth possible; of the passengers who have chosen time and time again to travel by Amtrak; of the localities and states that believed in the future of Amtrak and provided us with new train stations and other improvements; and, of course, of those in the Congress of the United States who had the vision and wherewithal to create and nurture us. I am proud of our

past achievements and even more optimistic about our future. We truly are at the dawn of a new era of highly marketable conventional and high-speed rail passenger service. Amtrak intends to be the leader in this area and at the forefront of a dynamic, financially healthy travel industry.

—W. Graham Clayton, Jr.
President

A STRATEGY FOR GROWTH

* * *

Amtrak's national passenger system forges an important link between the immense rural stretches of the nation and its urban centers. With over 500 stations and a 25,000 mile route system, Amtrak provides travelers—business executives, vacationers, families, students—with an important, enjoyable transportation alternative. During FY 1991, the number of miles traveled by Amtrak passengers grew 3.6 percent to 6.3 billion, up more than 110 percent since Amtrak commenced operations in 1971. Ridership remained steady at 40 million passengers, including 22 million intercity passengers (down a fraction of a percentage point from last year) and 18 million commuter passengers transported by Amtrak under contract with state or regional commuter authorities. The result of this growth in passenger miles has been an increase of revenues to $1.36 billion, up some 3.9 percent over last year. Revenues covered 79 percent of Amtrak's costs, the highest in the corporation's history. Given the weak national economy, this is an enviable achievement for a passenger transportation company.

* * *

NEW SERVICE AND FACILITIES

As the nation's sole provider of intercity rail passenger service, it is Amtrak's goal to add service wherever it can economically be justified. While the cost of equipment, capital improvements to the rail line, and potential operating losses, particularly on new routes, makes significant expansion of the Amtrak system financially unlikely at this time, a growing partnership with states willing to help fund new trains has enabled Amtrak to grow modestly each year. Already, over 40 daily trains are funded in part by states, and plans for additional service are proliferating. In California, a new multi-frequency rail service between Sacramento and San Jose will begin in December 1991. Two more Chicago-Milwaukee trains were added this past October and a second train in North Carolina is planned for next year. Several additional state-supported trains are under consideration.

One of the most important changes during the past year was completion of the Empire Connection in New York City, the first direct rail route between the Northeast Corridor and points north and west of New York City. In April, Amtrak trains to Albany and points beyond began operating directly out of New York Penn Station, eliminating Amtrak's Grand Central Terminal operations and the time-consuming cross-town transfers for passengers traveling to or from the Northeast Corridor. The consolidation of train operations in Penn Station represents a significant improvement for Amtrak's passengers. At the same time, it will reduce the operating costs associated with two New York City stations and boost revenues through improved ridership.

* * *

These and other station improvements reflect Amtrak's belief that train stations represent the front door of our business. They play a critical role in customer satisfaction and in the image Amtrak strive to project. As a result, Amtrak continues to work closely with states and communities to obtain

local funding for passenger station improvements. Over a dozen stations—including Lincoln, Neb., Carlinville, Ill., Montgomery, Ala., and Red Wing, Minn.—were renovated during the past year, funded primarily by states and local communities that want the traveler's first glimpse of their towns to be a positive one.

* * *

Of enormous long-term importance was the decision by Congress to fund continued improvements on the Northeast Corridor between New York and Boston to reduce travel time between the two cities to three hours or less. Completion of this project, scheduled for 1997, will mean 24 daily New York-Boston round-trip frequencies and some three million additional passengers each year. The service, which will operate with all new high-speed train equipment, is expected to generate important incremental profits that will improve Amtrak's bottom line.

Three hour service will further position the railroad to be the transportation mode of choice for travelers along the entire Washington-Boston Northeast Corridor.

DIVERSIFYING THE REVENUE STREAM

One important reason for Amtrak's growth during such a difficult time is its success in other revenue generating areas. Passenger revenues grew during 1991 at the rate of 3.6 percent and are approaching $1 billion for the first time in Amtrak's history. Of great importance, however, was growth of 4.6 percent in non-passenger revenues. Two key areas are generating significant revenues for Amtrak and represent superb growth opportunities for the future. The transportation of mail for the U.S. Postal Service grew dramatically, helped in part by national transportation priorities during the recent Desert Storm operation. Revenues grew to $43.6 million, an increase of 26 percent. With the acquisition of additional mail handling cars, Amtrak expects this area to generate close to

$100 million by the end of the decade. Moreover, potential mail revenues can provide the additional operating revenues necessary to initiate new rail passenger service. The reroute of the *Pioneer* through Wyoming was made possible by the potential for new mail business.

The operation of commuter services under contract for local, state or regional authorities is another high-growth opportunity for Amtrak. This area also has great symbolic significance, for each new commuter contract cements Amtrak's position as the rail passenger operator of choice. Amtrak's ability to successfully compete for the operation of new commuter and high-speed rail systems represents an important key to its future.

Amtrak carried some 18 miliion rail commuters under contract for the Boston area MBTA, Maryland MARC system, Connecticut DOT and Orange County, Calif., Transportation Commission. During the coming year, Amtrak will begin operation of the new Virginia Railway Express service between northern Virginia and Washington, and will compete for the contract to operate the San Jose-San Francisco Peninsula Commute Service in California.

One of Amtrak's most exciting achievements was the recent decision by Southern California Regional Rail Authority to award Amtrak a contract to operate an ambitious commuter network in the Los Angeles area. The commuter service is expected to grow significantly over the next decade as additional Los Angeles area commuter lines begin operation.

As the decade develops, Amtrak expects that revenues from real estate development, contract commuter operations, mail and express, and other revenue enhancement areas will continue to grow significantly. These activities will provide Amtrak with a cushion again yearly fluctuations in the national economy and travel market.

* * *

CONSOLIDATED STATEMENTS OF CHANGES IN CAPITALIZATION

National Railroad Passenger Corporation and Subsidiaries (Amtrak)

	Preferred stock	Common stock	Other paid-in capital	Accumulated deficit	Totals
Balance at September 30, 1989	$6,056,003	$93,857	$3,711,425	$(6,494,396)	$3,366,889
Issuance of preferred stock	560,411	—	—	—	560,411
Federal paid-in-capital	—	—	23,162	—	23,612
Federal and state capital payments	—	—	15,150	—	15,150
Net Loss	—	—	—	(703,415)	(703,415)
Balance at September 30, 1990	6,616,414	93,857	3,750,187	(7,197,811)	3,262,647
Issuance of preferred stock	529,375	—	—	—	529,375
Federal paid-in capital	—	—	180,689	—	180,689
Federal and state capital payments	—	—	22,445	—	22,445
Net loss	—	—	—	(721,588)	(721,588)
Balance at September 30, 1991	**$7,145,789**	**$93,857**	**$3,953,321**	**($7,919,399)**	**$3,273,568**

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS

National Railroad Corporation and Subsidiaries (Amtrak)
For the Years Ended September 30, 1991 and 1990

Summary of Significant Accounting Policies

Note 1.

PRINCIPLES OF CONSOLIDATION

The financial statements reflect the consolidated operations of the National Railroad Passenger Corporation and its wholly-owned subsidiaries, Chicago Union Station Company (CUS) and Washington Terminal Company. All significant intercompany transactions have been eliminated. Certain reclassifications have been made to the prior year's statements to conform with the 1991 presentation.

PASSENGER RELATED REVENUE

Passenger fares are recognized as operating revenues when the related transportation services are furnished. Tickets which have been sold but not used are presented as "Deferred ticket revenue" in the Consolidated Balance Sheets.

CONTRACTED SERVICES

The Consolidated Statements of Operations include the gross revenues earned and expenses incurred under arrangements to operate various commuter rail services, to provide access to the Northeast Corridor and other Amtrak-owned facilities, and to perform services for freight railroads.

CASH EQUIVALENTS AND SHORT-TERM CASH INVESTMENTS

Amtrak considers all financial instruments purchased having a maturity of three months or less to be cash equivalents.

Those financial instruments purchased with a maturity of over three months, and which mature not more than one year from the Consolidated Balance Sheet date, are classified as short-term cash investments. Approximately $6,400,000 of the cash and cash equivalents balance at September 30, 1991 is restricted for repair or acquisition of capital equipment.

PROPERTY AND DEPRECIATION

Property and equipment are stated at cost, and are depreciated using the composite straight-line method over their estimated useful lives. Certain major items of property acquired through capital lease agreements are recorded as assets and are amortized over the shorter of their estimated useful lives or the lease term.

CASUALTY LOSSES

Provision is made for Amtrak's portion of the estimated liability for unsettled casualty and accident claims. The current portion of this liability is included in the Consolidated Balance Sheets under "Accrued expenses and other current liabilities." The non-current portion is classified as "Casualty reserves." As a September 30, 1991 and 1990, the current claims liability included in accrued expenses and other current liabilities was $51,100,000 and $49,800,000, respectively.

Federal and State Funding

Note 2.

Funds are provided to Amtrak through federal and state payments for operations and for capital acquisitions and improvements. For funds received from the federal government, Section 304 of the Rail Passenger Service Act (45 U.S.C. 544) requires Amtrak to issue to the United States Secretary of Transportation preferred stock equal in par value to all federal operating payments and most federal capital

payments received subsequent to October 1, 1981, as well as capital and certain operating payments received prior to that date. Public Law 102-143, approved on October 28, 1991, provides $711,000,000 in federal funds to Amtrak for fiscal year 1992, of which $331,000,000 is for operating purposes, and the balance for capital acquisitions and improvements.

Federal paid-in-capital, included in the Consolidated Statements of Changes in Capitalization, includes certain funding received from the federal government to finance acquisition of and improvements to property and equipment. In exchange for past and prospective funding, Amtrak issued two promissory notes to the United States. The first note matures on November 1, 2082, with successive 99-year renewal terms, and is secured by certain Amtrak rolling stock. The second note matures on December 31, 2975, and is secured by Amtrak's real property. Neither of the notes bears interest, unless prepaid (which Amtrak does not intend to do). The federal government's security interest in Amtrak's real property and certain rolling stock entitles it to repayment plus interest in the event Amtrak ceases operations, is acquired by another entity, or seeks relief under bankruptcy or insolvency laws.

Federal paid-in capital also includes payments made on Amtrak's behalf by the Federal Railroad Administration (FRA). During the year ended September 30, 1991, the FRA deposited $144,798,000 with the Internal Revenue Service in payment of Amtrak's excess Railroad Retirement Tax Act tax liabilities, excess Railroad Unemployment Repayment Tax payments, and excess Railroad Unemployment Insurance Act payments. Deposits relating to excess tax liabilities are authorized by the Mandatory Passenger Rail Service Payments Provisions of the Fiscal Year 1991 Department of Transportation and Related Agencies Appropriation Act.

Preferred and Common Stock

Note 3.

At September 30, 1991, 73,100,000 shares of $100 par value preferred stock were authorized, of which 71,457,895 shares were issued and outstanding. On October 23, 1991, 433,310 shares of preferred stock were issued at par value, increasing the total number of shares issued and outstanding to 71,891,205. At September 30, 1990, 73,100,000 shares were authorized, of which 66,164,139 shares were issued and outstanding. All issued and outstanding preferred shares are held by the Secretary of Transportation for the benefit of the federal government. Dividends are to be fixed at a rate not less than 6% per annum and are cumulative so that no dividends may be paid on the common shares prior to the payment of all accrued but unpaid dividends on the preferred shares. No dividends have been declared. The preferred stockholder is also entitled to a liquidation preference over common shares involving a payment of not less than par value plus all accrued unpaid dividends. Each share of preferred stock is convertible into 10 shares of common stock at the option of the preferred stockholder.

At September 30, 1991 and 1990, 10,000,000 shares of $10 par value common stock were authorized, of which 9,385,694 shares were issued and outstanding.

* * *

PLAINTIFF'S EXHIBIT 11

REAL PROPERTY IDENTIFICATION DOCUMENT

THE FOLLOWING REAL PROPERTY IS IDENTIFIED FOR CONVEYANCE

FROM

PENNSYLVANIA TUNNEL AND TERMINAL RAILROAD COMPANY

a corporation organized and existing under the laws of the States of New Jersey and New York, ("Transferor"), whose address is
6 Penn Center Plaza
Philadelphia, Pennsylvania 19104

TO

CONSOLIDATED RAIL CORPORATION,

a corporation organized and existing under the laws of the Commonwealth of Pennsylvania ("Transferee"), whose address is 1818 Market Street, Philadelphia, Pennsylvania 19103

A. All of the Transferor's right, title and interest, legal and equitable, in and to the real property located in the County of New York, State of New York as described in Exhibit A attached to this Real Property Identification Document ("Document") as a part hereof, together with all of the appurtenances, hereditaments, franchises, ways, waters, minerals, rights, privileges, improvements, fixtures, licenses, leaseholds, reversions, easements, rights under operating, trackage and joint facility agreements, rents, issues, profits, and other interests and items belonging to or in any way appertaining to such real property, including but not limited to all real property items that would properly be recorded in Accounts 1 through 45 and 90 of the Property Accounts prescribed by the

Interstate Commerce Commission for Railroad Companies in its Uniform System of Accounts, 49 C.F.R. Part 1201, to the extent that such interests and items belong or in any way appertain to such real property, except as those interests and items belong or appertain to the real property hereinafter reserved and excepted.

B. 1. The easements and rights to use, operate, maintain, repair, renew, replace and remove on, under, over and across the real property hereinafter reserved and excepted ("Transferor's Burdened Property"), any and all lines, poles, pipes, appliances, equipment, structures, facilities and appurtenances (each an "Easement Item") existing on and used or useful as of the date of conveyance ("Conveyance Date") prescribed by the Conveyance Order entered pursuant to Section 303(b)(1) of the Regional Rail Reorganization Act of 1973, as amended ("Act") by the Special United States District Court established pursuant to Section 209 (b) of the Act ("Special Court"), as a part of any railroad communication, signal or interlocker system or as a part of any electric, telephone, telegraph, water, gas, steam, sanitary sewer, storm sewer or other utility system, together with the easement of reasonable access over the Transferor's Burdened Property to permit the exercise of the foregoing easements and rights, and the easement for lateral support of the real property identified for conveyance in this Document.

2. The easements and rights for the specific uses, if any, (each an "Easement Item") particularly described in Exhibit B attached to this Document as a part hereof and burdening certain real property hereinafter reserved and excepted.

3. The easements and rights described in Paragraphs B.1. and B.2. shall be subject to the following terms and conditions:

(a) The Transferee shall give the Transferor reasonable notice before entering on the Transferor's Burdened Property to exercise the easements and rights described in this Paragraph B, and shall exercise such easements and

rights (i) so as not to interfere unreasonably with the use and enjoyment of the Transferor's Burdened Property, (ii) in compliance with generally applicable reasonable requirements established from time to time by the Transferor and (iii) so as not to increase materially the burden on the Transferor's Burdened Property existing on the Conveyance Date. The Transferee shall indemnify and save the Transferor's harmless from any loss, damage or expense arising from the exercise of the foregoing easements and rights, without regard to negligence on the part of the Transferor or the Transferee. Upon request of and at the expense of the Transferor, the Transferee shall execute and deliver to the Transferor a deed or other instrument releasing the Transferee's rights in any part of the Transferor's Burdened Property that is not used or reasonably needed by the Transferee in the exercise of the easements and rights described in this paragraph B.

(b) If the location of any Easement Item would interfere with any proposed use or sale of any part of the Transferor's Burdened Property, the Transferor may, at the Transferor's expense and after obtaining the Transferee's written consent, relocate the interfering Easement Item or cause the same to be relocated. Such consent will be granted unless (i) the Easement Item cannot be relocated as proposed by the Transferor without unreasonable interference to the Transferee's operations or without damage to the integrity of the system of which the Easement Item is a part or (ii) the Transferee will not have reasonable access to the relocated Easement Item. If the transferee has previously released its easements and rights in any real property as provided in Paragraph B.3.a. and a relocated Easement Item falls, in whole or in part, within the area that has been so released, the Transferor and the Transferee shall exchange the following instruments promptly after the relocation is completed:

(i) The Transferor shall execute and deliver to the Transferee a supplementary deed of easement which con-

veys to the Transferee with respect to the relocated Easement Item the easements and rights described in this Paragraph B.

(ii) The Transferee shall execute and deliver to the Transferor a deed or other instrument of release as provided in Paragraph B.3.a.

(c) The Transferor shall bear all expenses and the cost of all transfer and recording taxes, fees and charges in connection with all deeds and other instruments delivered pursuant to this Paragraph B.

RESERVING AND EXCEPTING, HOWEVER, TO THE TRANSFEROR:

C. All the respective right, title and interest of the Transferor, legal and equitable, in and to the real property described in Exhibit B attached to this Document as a part hereof, but subject, however, to (a) the limitation of access thereto across the real property identified for conveyance in this Document as hereinafter provided and (b) the easements and rights identified for conveyance in Paragraph B above.

D. 1. The easements and rights to use, operate, maintain, repair, renew, replace and remove on, under, over and across the real property identified for conveyance in this document ("Transferee's Burdened Property"), any and all lines, poles, pipes, appliances, equipment, structures, facilities and appurtenances (each an "Easement Item") existing on and used or useful as of the Conveyance Date as a part of any railroad communication, signal or interlocker system or as a part of any electric, telephone, telegraph, water, gas, steam, sanitary sewer, storm sewer or other utility system, together with the easement of reasonable access over the Transferee's Burdened Property to permit the exercise of the foregoing easements and rights, and the easement for lateral support of the real property reserved and excepted in Paragraph C above.

2. The easements and rights for the specific uses, if any, (each an "Easement Item") particularly described in Exhibit B to this Document and burdening certain real property identified for conveyance in this Document.

3. The easements and rights described in Paragraphs D.1. and D.2. shall be subject to the following terms and conditions:

(a) The Transferor shall give the Transferee reasonable notice before entering on the Transferee's Burdened Property to exercise the easements and rights reserved and excepted in this Paragraph D, and shall exercise such easements and rights (i) so as not to interfere unreasonably with the use and enjoyment of the Transferee's Burdened Property, (ii) in compliance with generally applicable reasonable requirements established from time to time by the Transferee and (iii) so as not to increase materially the burden on the Transferee's Burdened Property existing on the Conveyance Date. The Transferor shall indemnify and save the Transferee harmless from any loss, damage or expense arising from the exercise of the foregoing easements and rights, without regard to negligence on the part of the Transferee or the Transferor. Upon request of and at the expense of the Transferee, the Transferor shall execute and deliver to the Transferee a deed or other instrument releasing the Transferor's rights in any part of the Transferee's Burdened Property that is not used or reasonably needed by the Transferor in the exercise of the easements and rights described in this paragraph D.

(b) If the location of any Easement Item would interfere with any proposed use or sale of any part of the Transferee's Burdened Property, the Transferee may, at the Transferee's expense and after obtaining the Transferor's written consent, relocate the interfering Easement Item or cause the same to be relocated. Such consent will be granted unless (i) the Easement Item cannot be relocated as proposed by the Transferee without unreasonable interfer-

ence to the Transferor's operations or without damage to the integrity of the system of which the Easement Item is a part or (ii) the Transferor will not have reasonable access to the relocated Easement Item. If the Transferor has previously released its easements and rights in any real property as provided in Paragraph D.3.a. and a relocated Easement Item falls, in whole or in part, within the area that has been so released, the Transferee and the Transferor shall exchange the following instruments promptly after the relocation is completed:

(i) The Transferee shall execute and deliver to the Transferor a supplementary deed of easement which conveys to the Transferor with respect to the relocated Easement Item the easements and rights described in this Paragraph D.

(ii) The Transferor shall execute and deliver to the Transferee a deed or other instrument of release as provided in Paragraph D.3.a.

(c) The Transferee shall bear all expenses and the cost of all transfer and recording taxes, fees and charges in connection with all deeds and other instruments delivered pursuant to this Paragraph D.

E. All mineral rights owned by the Transferor in any parcel as to which an interest in the surface is not identified for conveyance in this Document.

THE REAL PROPERTY AND THE EASEMENTS AND RIGHTS IDENTIFIED FOR CONVEYANCE in this Document shall be had and held by the Transferee free and clear of (a) any liens or encumbrances as provided in Section 303(b) of the Act and (b) any and all easements and rights of access to the real property identified in this Document as reserved and excepted from conveyance across the real property identified for conveyance in this Document (except as otherwise provided in this Document), even if such easements and rights would otherwise arise by reason of necessity, implication or other operation or law, statute, ordinance, rule or regulation of any governmental entity, BUT SUBJECT, HOWEVER, to (i) those easements and rights reserved and excepted in Paragraph D above, (ii) all existing licenses, easements, leases (other than those which may have been created to secure payment of a financial obligation), and operating, trackage right and joint facility agreements and (iii) the conveyance of operating rights, if any, from the Transferor to a third party effected concurrently with the conveyance of the real property identified for conveyance in this Document and identified in Exhibit B to this Document.

The words "Transferor" and "Transferee" used herein shall be construed as if they read "Transferors" and "Transferees," respectively, whenever the sense of this Document so requires and, whether singular or plural, such words shall be deemed to include in all cases the successors and assigns of the persons designated.

All of the convenants of the Transferor and the Transferee, respectively, shall be deemed to be real convenants and shall run with the land.

EXHIBIT A

TO THE REAL PROPERTY IDENTIFICATION DOCUMENT

FROM

PENNSYLVANIA TUNNEL AND TERMINAL RAILROAD COMPANY

TO

CONSOLIDATED RAIL CORPORATION

DESCRIPTION OF REAL PROPERTY LOCATED IN

County of New York, State of New York

For the purpose of each description contained in this Exhibit A (and solely by way of illustration and not by way of omitting the generality of the term "adjacent"), adjacency shall be deemed to exist without regard to the existence of any public or private street, highway, alley, or other way between one part of the Transferor's real property and another.

This Exhibit A consists of pages A-1 through A-3 inclusive.

Situate in the County of New York, State of New York, and being the Pennsylvania Tunnel and Terminal Railroad Company's line of railroad known as the Penn Central New York-Philadelphia Main Line and being all the real property in the County lying in, under, above, along, contiguous to, adjacent to or connecting to such line.

Such line originates in the County at Penn Station, connecting to another line of railroad known as the Hell Gate

Line and leaves the County in the Hudson River Tunnel at the New York-New Jersey State Line.

The line of railroad described herein is identified as Line Code 1041A in the records of the United States Railway Association.

Situate in the County of New York, State of New York, and being the Pennsylvania Tunnel and Terminal Railroad Company's line of railroad known as the Penn Central Hell Gate Line and being all the real property in the County lying in, under, above, along, contiguous to, adjacent to or connecting to such line.

Such line originates in the County at Penn Station, connecting to another line of railroad known as the New York-Philadelphia Main Line, passes through the tunnel and leaves the County near the East River Crossing to Queens.

The line of railroad described herein is identified as Line Code 1411 in the records of the United States Railway Association.

* * *

PLAINTIFF'S EXHIBIT 12

DEED

THIS DEED IS MADE BY AND BETWEEN

CONSOLIDATED RAIL CORPORATION

("Grantor"), a Pennsylvania corporation
whose address is Six Penn Center,
Philadelphia, Pennsylvania 19104

AND

NATIONAL RAILROAD PASSENGER CORPORATION

("Grantee"), a District of Columbia corporation,
whose address is 955 L'Enfant Plaza, S.W.
Washington, D. C. 20024

Whereas, pursuant to the Regional Rail Reorganization Act of 1973 (Public Law 93-236, 87 Stat. 985) as amended ("Act") and the Final System Plan, the United States Railway Association ("USRA"), pursuant to Section 209(c) of the Act, has certified to the Special United States District Court established pursuant to Section 209(b) of the Act ("Special Court") and pursuant to a certain Agreement of Purchase dated March 31, 1976 between Grantor and Grantee, the Grantor, for consideration paid, hereby grants and conveys to the Grantee:

A. All of the Grantor's right, title and interest, legal and equitable, in and to the real property located in the County of New York in the State of New York as described in Exhibit A attached to this Deed as a part hereof, together with all of the appurtenances, hereditaments, franchises, ways, waters, minerals, rights, privileges, improvements, fixtures, licenses, leaseholds, reversions, easements, rights under operating, trackage and joint facility agreements, rents, issues, profits and other interests and items belonging to or in any way appertaining to such real property, including (without limitation) the same easements and rights with respect to the real property reserved and excepted from the conveyance to

Grantor by Grantor's immediate predecessor in title as Grantor received with respect thereto under said conveyance, as well as all real property items that would properly be recorded in Accounts 1 through 45 and 90 of the Property Accounts prescribed by the Interstate Commerce Commission for Railroad Companies in its Uniform System of Accounts, 49 C.F.R. Part 1201, to the extent that such interests and items belong or in any way appertain to such real property, except as those interests and items belong or appertain to the real property hereinafter reserved and excepted.

B.1. The easements and rights to use, operate, maintain, repair, renew, replace and remove on, under, over and across the real property conveyed to Grantor pursuant to the Act but not conveyed to Grantee hereby ("Grantor's Burdened Property"), any and all lines, poles, pipes, appliances, equipment, structures, facilities and appurtenances (each an "Easement Item") existing on and used or useful as of the date of delivery of this Deed as a part of any railroad communication, signal or interlocker system or as a part of any electric, telephone, telegraph, water, gas, steam, sanitary sewer, storm sewer or other utility system, together with the easement of reasonable access over the Grantor's Burdened Property to permit the exercise of the foregoing easements and rights, and the easement for lateral support of the real property conveyed by this Deed.

2. The easements and rights for the specific uses, if any, (each an "Easement Item") particularly described in Exhibit B attached to this Deed as a part hereof, if any, and burdening a certain portion of Grantor's Burdened Property.

3. The Grantee shall give the Grantor reasonable notice before entering on the Grantor's Burdened Property to exercise the easements and rights granted in this Paragraph B, and shall exercise such easements and rights (a) so as not to interfere unreasonably with the use and enjoyment of the Grantor's Burdened Property, (b) in compliance with generally applicable reasonable requirements established from time to time by the Grantor and (c) so as not to increase materially the bur-

den on the Grantor's Burdened Property existing on the date of delivery of this Deed. The Grantee shall indemnify and save the Grantor harmless from any loss, damage or expense arising from the exercise of the foregoing easements and rights, without regard to negligence on the part of the Grantor or the Grantee. Upon request of and at the expense of the Grantor, the Grantee shall execute and deliver to the Grantor a deed or other instrument releasing the Grantee's rights in any part of the Grantor's Burdened Property that is not used or reasonably needed by the Grantee in the exercise of the easements and rights conveyed in this Paragraph B.

4. If the location of any Easement Item would interfere with any proposed use or sale of any part of the Grantor's Burdened Property, the Grantor may, at the Grantor's expense and after obtaining the Grantee's written consent, relocate the interfering Easement Item or cause the same to be relocated. Such consent will be granted unless (a) the Easement Item cannot be relocated as proposed by the Grantor without unreasonable interference to the Grantee's operations or without damage to the integrity of the system of which the Easement Item is a part or (b) the Grantee will not have reasonable access to the relocated Easement Item. If the Grantee has previously released its easements and rights in any real property as provided in Paragraph B.3. and a relocated Easement Item falls, in whole or in part, within the area that has been so released, the Grantor and the Grantee shall exchange the following instruments promptly after the relocation is completed:

(a) The Grantor shall execute and deliver to the Grantee a supplementary deed of easement which conveys to the Grantee with respect to the relocated Easement Item the easements and rights described in this Paragraph B.

(b) The Grantee shall execute and deliver to the Grantor a deed or other instrument of release as provided in Paragraph B.3.

5. The Grantor shall bear all expenses and the cost of all transfer and recording taxes, fees and charges in connection

with all deeds and other instruments delivered pursuant to this Paragraph B.

RESERVING AND EXCEPTING, HOWEVER, TO THE GRANTOR:

C. All the respective right, title and interest of the Grantor, legal and equitable, in and to the real property described in Exhibit B attached to this Deed as a part hereof, if any, but subject, however, to the easements and rights conveyed pursuant to Paragraph B above.

D.1. The easements and rights to use, operate, maintain, repair, renew, replace and remove on, under, over and across the real property conveyed by this Deed ("Grantee's Burdened Property"), any and all lines, poles, pipes, appliances, equipment, structures, facilities and appurtenances (each an "Easement Item") existing on and used or useful as of the date of delivery of this Deed as a part of any railroad communication, signal or interlocker system or as a part of any electric, telephone, telegraph, water, gas, steam, sanitary sewer, storm sewer or other utility system, together with the easement of reasonable access over the Grantee's Burdened Property to permit the exercise of the foregoing easements and rights, and the easement for lateral support of the real property reserved and excepted from this conveyance.

2. The easements and rights for the specific uses, if any, (each an "Easement Item") particularly described in Exhibit B to this Deed, if any, and burdening certain real property conveyed by this Deed.

3. The Grantor shall give the Grantee reasonable notice before entering on the Grantee's Burdened Property to exercise the easements and rights reserved and excepted in this Paragraph D, and shall exercise such easements and rights (a) so as not to interfere unreasonably with the use and enjoyment of the Grantee's Burdened Property, (b) in compliance with generally applicable reasonable requirements established from time to time by the Grantee and (c) so as not to increase

materially the burden on the Grantee's Burdened Property existing on the date of delivery of this Deed. The Grantor shall indemnify and save the Grantee harmless from any loss, damage or expense arising from the exercise of the foregoing easements and rights, without regard to negligence on the part of the Grantee or the Grantor. Upon request of and at the expense of the Grantee, the Grantor shall execute and deliver to the Grantee a deed or other instrument releasing the Grantor's rights in any part of the Grantee's Burdened Property that is not used or reasonably needed by the Grantor in the exercise of the easements and rights reserved and excepted in this Paragraph D.

4. If the location of any Easement Item would interfere with any proposed use or sale of any part of the Grantee's Burdened Property, the Grantee may, at the Grantee's expense and after obtaining the Grantor's written consent, relocate the interfering Easement Item or cause the same to be relocated. Such consent will be granted unless (a) the Easement Item cannot be relocated as proposed by the Grantee without unreasonable interference to the Grantor's operations or without damage to the integrity of the system of which the Easement Item is a part or (b) the Grantor will not have reasonable access to the relocated Easement Item. If the Grantor has previously released its easements and rights in any real property as provided in Paragraph D.3. and a relocated Easement Item falls, in whole or in part, within the area that has been so released, the Grantor and the Grantee shall exchange the following instruments promptly after the relocation is completed:

(a) The Grantee shall execute and deliver to the Grantor a supplementary deed of easement which conveys to the Grantor with respect to the relocated Easement Item the easements and rights described in this Paragraph D.

(b) The Grantor shall execute and deliver to the Grantee a deed or other instrument of release as provided in Paragraph D.3.

5. The Grantee shall bear all expenses and the cost of all transfer and recording taxes, fees and charges in connection with all deeds and other instruments delivered pursuant to this Paragraph D.

E. The easements and rights described in Exhibit C to this Deed and burdening all of the real property conveyed by this Deed.

F. All mineral rights owned by the Grantor in any parcel as to which an interest in the surface is not conveyed by this Deed.

TO HAVE AND TO HOLD the real property and the easements and rights hereby conveyed to the Grantee, free and clear of any liens and encumbrances insofar as said real property, easements and rights were conveyed to Grantor so free and clear by Grantor's immediate predecessor in title or interest therein, BUT SUBJECT, HOWEVER, to (i) those easements and rights reserved and excepted pursuant to Paragraphs D and E, (ii) all existing licenses, easements, leases (other than those which may have been created to secure payment of a financial obligation), and operating, trackage right and joint facility agreements, including (without limitation) the easements, rights and benefits reserved by Grantor's predecessor in title, (iii) Operating Rights Grants, if any, from the Grantor to a third party conveyed pursuant to the Act and identified in Exhibit B to this Deed; and (iv) the obligation of the Grantee to use, operate, maintain and repair the real property conveyed by this Deed so as to permit the Grantor freely to exercise the Freight Service Easement and the Commuter Passenger Service Easement described in Exhibit C.

The Grantor hereby covenants that the Grantor will perform, execute, acknowledge and deliver any and all such further acts, deeds, assignments and other instruments as may be reasonably requested by the Grantee to convey, confirm, clarify, identify or more precisely describe the real property and the easements and rights conveyed by this Deed or intended so to be in order to carry out the intent of this Deed in light of the designations contained in the Final System Plan which has

been certified to the Special Court by the United States Railway Association pursuant to the Act and in light of the Agreement of Purchase between the Grantor and Grantee bearing the same date hereof, and to effect the recordation of, or otherwise perfect, this Deed and all such other deeds, assignments and instruments under any applicable statute, ordinance, rule or regulation.

The Grantee hereby covenants that the Grantee will perform, execute, acknowledge and deliver any and all such further acts, deeds, assignments and other instruments as may be reasonably requested by the Grantor to confirm, clarify, identify or more precisely describe the real property and the easements and rights reserved and excepted from this conveyance or intended so to be in order to carry out the intent of this Deed in light of the designations contained in such Final System Plan and in light of the Agreement of Purchase between the Grantor and Grantee bearing the same date hereof, and to effect the recordation of, or otherwise perfect, this Deed and all such other deeds, assignments and instruments under any applicable statute, ordinance, rule or regulation.

By acceptance of this Deed, the Grantee (a) agrees to perform each of the obligations imposed on the Grantee by the terms of this Deed, and (b) assumes and agrees to perform and observe all obligations and conditions on the part of the Grantor or the Grantor's predecessor in title to be performed or observed that arise or accrue after the date of delivery of this Deed under all licenses, easements, leases (other than those which may have been created to secure payment of a financial obligation) and operating, trackage right and joint facility agreements (subject, however, to the terms thereof) which are conveyed by this Deed and under those to which this conveyance is made subject, provided that the Grantee assumes no obligation or liability that arises after the date of delivery of this Deed out of any event, act or failure to act that occurred prior thereto and, where an obligation or liability is related to a period which is both before and after such

date, the Grantee assumes only that portion of the obligation or liability which is reasonably allocable to the part of the period after such date. Concurrently with the delivery of this Deed, the Grantee is delivering to the Grantor a separate instrument executed by the Grantee acknowledging receipt and acceptance of this Deed and affirming the provisions of this paragraph.

All of the covenants of the Grantor and the Grantee, respectively, shall be deemed to be real covenants and shall run with the land.

The words "Grantor" and "Grantee" used herein shall be construed as if they read "Grantors" and "Grantees", respectively, whenever the sense of this Deed so requires and, whether singular or plural, such words shall be deemed to include in all cases the successors and assigns of the respective parties.

IN WITNESS WHEREOF, Grantor has caused this Deed to be executed this 1st day of April, 1976 in its corporate name by Miller Heath, its Assistant Vice-President, attested to by [ILLEGIBLE], its Assistant Secretary, and its corporate seal to be hereunto affixed, and does hereby appoint said Miller Heath, its Assistant Vice-President, its true and lawful attorney-in-fact for it and in its name to acknowledge and deliver this Deed as its act and deed.

CONSOLIDATED RAIL CORPORATION

By: /s/ MILLER HEATH
Assistant Vice-President

Attest: /s/ [ILLEGIBLE]
Assistant Secretary

[CORPORATE SEAL]

ACKNOWLEDGMENT:

DISTRICT OF COLUMBIA, ss:

I, Richard E. Rankin, Jr., a Notary Public of said District, do certify that on this 1st day of April, 1976 before me personally appeared Miller Heath, who, being first by me duly sworn, did depose and acknowledge himself to be an Assistant Vice-President of Consolidated Rail Corporation, a corporation, and that he, as an Assistant Vice-President, being authorized so to do by order of its Board of Directors, executed the foregoing Deed for the purposes therein contained by signing the name of the corporation by himself as an Assistant Vice-President, that he knows the seal of said corporation, that the seal affixed to said Deed is such corporate seal, and that it was so affixed by order of the Board of Directors of said Corporation.

IN WITNESS WHEREOF I have hereunto set my hand and official seal the day and date first hereinabove written.

My commission expires on September 30, 1980.

/s/ Richard E. Rankin, Jr.
Notary Public

EXHIBIT A

TO THE DEED BY AND BETWEEN

CONSOLIDATED RAIL CORPORATION

AND

NATIONAL RAILROAD PASSENGER CORPORATION

DESCRIPTION OF REAL PROPERTY

LOCATED IN

County of New York

State of New York

For the purpose of each description contained in this Exhibit A (and solely by way of illustration and not by way of limiting the generality of the term "adjacent"), adjacency shall be deemed to exist without regard to the existence of any public or private street, highway, alley or other way between one part of the Grantor's real property and another.

For the Grantor's title to the property conveyed by this Deed reference is made to conveyance to the Grantor from the Pennsylvania Tunnel & Terminal Railroad Company by order of the Special Court, recorded, prior to the recording of this Deed, with the recording office of the above specified jurisdiction.

This Exhibit A consists of pages A-1 through A-3 inclusive.

Situate in the County of New York, State of New York, and being the Pennsylvania Tunnel and Terminal Railroad Company's line of railroad known as the Penn Central New York-Philadelphia Main Line and being all the real property in the County lying in, under, above, along, contiguous to, adjacent to or connecting to such line.

Such line originates in the County at Penn Station, connecting to another line of railroad known as the Hell Gate Line and leaves the County in the Hudson River Tunnel at the New York-New Jersey State Line.

The line of railroad described herein is identified as Line Code 1401A in the records of the United States Railway Association.

Situate in the County of New York, State of New York, and being the Pennsylvania Tunnel and Terminal Railroad Company's line of railroad known as the Penn Central Hell Gate Line and being all the real property in the County lying in, under, above, along, contiguous to, adjacent to or connecting to such line.

Such line originates in the County at Penn Station, connecting to another line of railroad known as the New York-Philadelphia Main Line, passes through the tunnel and leaves the County near the East River Crossing to Queens.

The line of railroad described herein is identified as Line Code 1411 in the records of the United States Railway Association.

* * *

PLAINTIFF'S EXHIBIT 18

This Agreement made the 25th day of May, One thousand nine hundred and sixty-seven (1967), between THE PENNSYLVANIA RAILROAD COMPANY, Lessee of the works and property of The Pennsylvania Tunnel and Terminal Railroad Company, hereinafter called Licensor, of the one part, and TRANSPORTATION DISPLAYS, INC., a Corporation of the State of New York, with address: 17 East 45th Street, New York, New York 10017, hereinafter called Licensee, of the other part;

Witnesseth, that Licensor, for and in consideration of the payments, covenants and agreements hereinafter mentioned, stipulated and contained, on the part of Licensee to be paid, kept and performed does hereby permit the Licensee to construct and maintain, at Licensee's own cost and expense, an advertising spectacular display for sale to advertisers, being 100 feet in length by 10 feet in width situate over Licensor's ticket counter located on the west side of the Ticket Concourse of Licensor's Pennsylvania Station situate between Eighth and Seventh Avenue, 31st to 33rd Streets, in the Borough of Manhattan, City, County and State of New York.

Term. This agreement and the said privilege shall commence on the FIRST day of JANUARY 1967, and continue thereafter for the term of three (3) years ending December 31, 1969 (unless sooner terminated as hereinafter provided at and for the compensation hereinafter provided.

Electric current and ventilation. Licensor will supply electric current for Licensee's use and ventilation to exhaust the heat generated by the illumination of said ventilation advertising spectacular. Licensee agrees that Licensor shall not be liable for any failure to supply electric current and ventilation not due to gross negligence on its part. In the event, however, of any power failure wherein Licensee

is obligated to allow Advertiser a credit against rent or cost of power consumed, than Licensor will extend the same credit to Licensee.

Definition

For all purposes of this Agreement, the term "space" shall be defined to mean the advertising and the area occupied thereby. Licensee hereby covenants and agrees to and with Licensor as follows:

Rent

1. That commencing April 1, 1967 Licensee shall pay to Licensor for the privilege herein conferred the sum of money, which shall be equal to sixty percentum (60%) of the gross receipts derived from advertising displayed on said spectacular, less agency commissions, cash discounts, or fees paid to collection agencies, but no commission of any kind to parent, subsidiary, or affiliated company. Licensee shall furnish Licensor on or before the 15th day of each month a true and correct statement of the gross receipts derived from advertising under the rights and privileges herein granted during the preceding calendar month, and shall on or before the said 15th pay unto Licensor the amount or amounts to which Licensor is entitled under the foregoing provisions of this agreement. It is understood and agreed that all such payments will be due and payable on a monthly basis as aforesaid. All statements and payments shall be addressed to Licensor's Agent: P.C. Box 8333, Philadelphia, Pennsylvania, or at such other place Licensor may designate from time to time.

Additional Rent

That Licensee further covenants and agrees to pay to the Licensor, as additional rental for the electric current and ventilation furnished, a sum of $540.00 per month commencing January 1, 1967; said sum to be paid in advance, on the

first day of each and every month during the continuance of this agreement at the said office of Licensor's Agent.

Licensee to Pay Taxes to Excesses etc.

2. That Licensee shall and will pay any and all taxes (exclusive of income or profits taxes payable by Licensor) assessed against the business and receipts of Licensee.

Covenant to Pay Compensation

3. Licensee will pay the amounts of money herein specified at the times and in the manner herein provided, and all damages, costs and charges in this agreement provided for, and in case of non-payment thereof, or in case the said space shall be deserted or vacated during the continuance of the agreement, Licensor may occupy the same, either by force or otherwise, without being liable to any prosecution or action therefor, and may proceed according to law for the collection of the amount of money due, and also for all damages, costs and charges in this agreement mentioned and provided for, with the same force and effect as if the same were a proceeding for rent in arrear. If Licensee,

Re-entry and Collection by Legal Proceedings

at any time during the continuance of this agreement, shall attempt to remove or manifest an intention to remove the goods and chattels from the said pace without first having paid and satisfied Licensor in full for all sums of money which shall have become due, or if Licensee becomes insolvent or bankrupt or makes an assignment for the benefit of creditors, or is sold out by any sale under process of law, then and in such cases Licensor shall be first paid out of the proceeds of such assignment or sale, or Licensor may proceed according to law to collect the same, any law, usage or custom to the contrary notwithstanding.

Licensee to Maintain Premises and Furnishings etc.

4. That Licensee shall and will keep the said space and the furniture, furnishings, fixtures and equipment in constant good order, repair and condition, satisfactory to Licensor, including the replacement of lamps and broken glass, during the continuance of this agreement, and upon the termination thereof, peaceably deliver to Licensor possession of the said space in like good order, repair and condition, reasonable wear and tear and damage by fire and other casualties, not occurring through Licensee's negligence, excepted. Licensee further agrees that upon the termination of this agreement, Licensee shall and will, at Licensee's sole cost and expense, remove from the said space all furniture, furnishings, fixtures and equipment, goods and property owned by it and restore the space to a condition satisfactory to Licensor; in case Licensee shall neglect or refuse so to do Licensor shall have the right forthwith to make such removal and restoration at the cost and expense of Licensee, which cost and expense Licensee hereby expressly agrees to pay on demand, and Licensee hereby authorizes Licensor so to do, without being liable to Licensee or to any other person or persons, corporation or corporations, for any damage or compensation or to any suit or action for or on account of the same.

Removal Provisions

Use and Covenant Against Assignment deal Sub-letting

5. Not (under penalty of forfeiture of this agreement) to use or occupy the said space for any other purpose whatsoever than as aforesaid; and not to assign or transfer this agreement, in whole or in part, nor underlet or permit the use and by any other person or persons, corporation or corporations of the said space, or any part thereof, without the written consent of Licensor having been first obtained; or occupy or permit

the same to be occupied or used for any purpose deemed extra-hazardous on account of fire or otherwise, whereby or in consequence whereof the conditions or stipulations of the policy or policies of fire or other insurance on the building of which the said space is part may become voided or suspended, and will at Licensee's cost and expense comply with the rules, regulations and requirements (except structural alterations) of the local Board of Fire Underwriters and will allow Licensor's Insurance Department Inspectors to periodically inspect the said space when making fire inspection of the building of which the same is part.

To Keep Premises Clean

6. To keep the said space in clean and sanitary condition, including cleaning of floors, windows and lighting fixtures, and will cause all dirt, rubbish and other refuse matter to be carefully collected and promptly disposed of in a manner satisfactory to Licensor.* (See Below).

Laws, Orders Rules and Regulations

7. To comply, at Licensee's sole cost and expense, with Federal, State and Municipal laws laws, orders, rules and regulations.

Licensee to Keep Accounts and Permit Inspection Thereof

8. To keep such accounts of the business conducted and transacted upon the said space as Licensor may request, and permit the duly accredited representatives of Licensor to examine the same at any and all times for the purpose of ascertaining the actual amount of the gross receipts, expenditures and charges in connection with the business conducted by Licensee in the

* The removal of said dirt, rubbish and other refuse matter shall be at the expense of Licensee and Licensee shall employ only such cleaning, garbage and trash removal contractors as may be approved by Licensor.

exercise of the privilege accorded by this agreement.

Licensee's Employees to Properly Conduct Themselves

9. That while Licensee's officers, agents and employees are on the premises of Licensor, hereunder, it will cause them to conduct themselves in a proper manner and if complaint is Conductmade by Licensor, Licensee will forthwith take such corrective measures as are necessary.

Signs and Advertisements

10. Not to paint, post or display any sign or advertisement on the said space without the prior written approval of Licensor and the requirement for such approval shall extend to the location, character, design, coloring and lettering of such sign or advertisement.

Right of Licensor to Enter, Inspect and Make Repairs

11. To permit Licensor to enter the space at any and all times for the purpose of inspecting the same and for making repairs to the building, and Licensee will not make any claim for loss or damages by reason of inconvenience or interruption to business arising therefrom. Nothing herein contained shall be construed to release Licensee from the obligation to keep the said space in good order and condition as hereinbefore provided.

Licensee Not to Make Additions, alterations or Improvements

12. Not to make any additions, alterations or improvements without the prior written consent of Licensor, and all additions, alterations or improvements made by either of the parties hereto upon the said space except movable furniture, furnishings and trade fixtures installed thereon at the expense of Licensee, shall be the property of Licensor and shall remain upon and be surrendered to Licensor upon the termination of this agreement, without molestation or injury.

Responsibility of Licensee to Its Employees

13. That in the performance of any and all work to be done by Licensor under the terms of this agreement or which may arise thereunder, result therefrom, or be in any way connected therewith or any operation thereunder. Licensee will furnish all labor and supervisory forces of every kind and it is expressly understood and agreed that Licensee shall employ, pay from Licensee's own funds and discharge all persons engaged in the performance of such work; and all such persons shall be and remain the sole employees and subject to Licensee's exclusive supervision, direction and control.

Licensee to Notify Licensor of Breakage of Pipes, Wires, etc.

14. To give to Licensor prompt written notice of any accidents to or defects in the water pipes or electric wires to be remedied by Licensor with due diligence. Licensor shallnot be responsible for any loss, injury or damage which may happen to the person or property of Licensee or Licensee's employees or persons claiming under Licensee on or about the said space caused by theft, or by the handling of electric lamps or wires, or accident to or breakage of any of the machinery or fixtures connected with the building of which the said space is part, or by water, rain or snow which may leak into, issue or overflow from any part of the said building; nor shall Licensor be responsible for any claim whatsoever of employees of Licensee or their representatives, on account of death, personal injury or otherwise, howsoever occurring or sustained.

Licensee to Indemnify Licensor Against Payment of Claims, etc.

15. That if at any time during the continuance of this agreement any accident to any person or persons or property shall occur in, on or in proximity to the said space, by reason of the gence of Licensee or Licensee's agents or employees, and in any action or actions brought, to recover damages therefor, judgment shall be recovered against Licen-sor, then and in every such event, upon written demand being made upon Licensee, Licensee shall and will promptly pay to Licensor the amount of any and every such judgment which may have been **[Illegible]** against Licensor, together with all reasonable and proper costs, expenses and counsel fees to which Licensor may or shall be subjected in the defense of such action or actions, provided, however, that Licensor shall have given written notice to Licensee of the pendency of such action or actions and shall have afforded counsel of Licensee. a reasonable time, if so requested to cooperate with Licensor's counsel in the defense of such action or actions.

Workmen's Compensation and Other Insurance

16. Licensee shall at all times during the continuance of this lease, at Licensee's sole cost and expense, procure and maintain Public Liability Insurance in the name of the licensee with contractual liability and endorsement quoting verbatim the liability assumed by the Licensee under this lease for bodily injury limits of $100,000.00 one person, $300,000.00 one accident, and will furnish to Licensor satisfactory evidence of such insurance.

17. That each proposed advertisement shall, before a binding contract is entered into and the advertisement place or installed, be submitted to the Licensor for, its written approval (which approval shall not be unreasonably withheld) of

the following: size or dimension, nature of product to be advertised, form, nature, style, wording and contents of the advertisement.

18. That without limiting the scope of its rights to disapprove any advertising which Licensor in its sole judgment considers should not be accepted or installed by Licensee, Licensor makes the reservations contained throughout this agreement for the reasons, among others, that certain advertising may relate to commodities, matters, or things which the Licensor in its judgment may deem unlawful, immoral, improper or offensive to good taste, or be in competition directly or indirectly with the transportation conducted by Licensor or its affiliated companies; or involve political or other views which could result in dissension or involve Licensor in dissension, complaints or controversy with its patrons or the public or involve matters or raminifications not now anticipated or foreseeable.

19. That Licensee shall provide in its contracts with its advertisers that notwithstanding the fact that Licensor and Licensee may have permitted the advertising to be placed on Licensor's property as herein provided, Licensor reserves the right and shall have the right to cause to be removed forthwith without liability to Licensee or its advertiser any advertisement which in the judgement of Licensor is or might be deemed to be slanderous, libelous, unlawful, immoral, offensive to good taste, involves illegal competition or trade practices, infringement of trademarks, trade names, violates rights of privacy, infringement of copyrights or proprietary rights.

20. That Licensee shall construct and install said advertising spectacular, at its own cost and expense, at a cost not to exceed $61,000.00. Plans and specifications for the construction and installation of said spectacular have been approved by Licensor. Licensee shall and will provide Licensor with a certified statement, in detail, of the amount so expended by it together with a full and complete release of liens within thirty (30) days after completion of work.

21. That Licensee shall and will, at its own ~~cost and expense, assume entire~~ installation and maintenance of display and supporting structure and all facilities in connection therewith, including, but not limited to ordinary and extraordinary maintenance, cleaning, replacement of lamps, supervision, all display equipment including transparencies, front lighted copy, lighting equipment and light fixtures, and all special equipment and fixtures required.

22. That Licensee for itself, its employees and agents, covenants and agrees that it and they will place, remove and arrange its materials or property and in general do any and all work under this agreement at such time and in such manner as in no way to impede or interfere with the operations of Licensor.

IT IS HEREBY MUTUALLY UNDERSTOOD AND AGREED:

Fire Clause (To be ruled out of At Will Agreements)

I. That if, during the continuance of this agreement, the said space is so damaged by fire or other casualty, not occurring through Licensee's negligence, that the same is rendered wholly unfit for occupancy and cannot be repaired within sixty days from the happening of such damage, then this agreement shall cease and terminate from the date of such damage; in such case Licensee shall pay the compensation appor-

tioned to the time of such damage and shall immediately surrender the said space to Licensor, who may enter upon and repossess the same. If such damage can be repaired within sixty days thereafter, Licensor may enter and repair, provided that it shall elect so to do; then this agreement shall not be affected, except that the compensation shall be apportioned and suspended while such repairs are being made, but if Licensor shall elect not to repair, then this agreement shall cease and terminate and the compensation shall be apportioned as in the instance first above recited; but if said space shall be so slightly damaged by fire or other casualty as not to be rendered unfit for occupancy, then Licensor agrees that the same shall be repaired with reasonable promptness, and in that case compensation accrued or accruing shall not cease or terminate.

~~Termination Clause~~

II. ~~That either party hereto shall have the right to~~ **[Illegible]** ~~privilege at any time hereafter by giving to the other written notice, by legal service, of the intension so to do, and upon the expiration of the time mentioned in such notice the said privilege shall cease and Licensee shall quit and deliver possession of the said space to the Licensor. In the event of Licensor exercising its right to terminate this agreement as in this paragraph provided, without breach of covenant on the part of Licensee, the proportionate part of the compensation paid in advance shall be refunded to and accepted Licensee as payment in full for that portion of the time unexpired for which~~ **[Illegible]** ~~possession of the said space.~~

Termination by Licensor in Event of Use for Corporate Purposes (To be ruled out of At Will Agreements)

III. That Licensor shall have the right in the event that it shall require the said space for its corporate purposes, upon giving Licensee three months prior written notice, to terminate this agreement at any time during the said term or any extension thereof, and on the date specified in said notice, this agreement shall expire as fully and completely) as if that date were the date herein definitely fixed for the expiration thereof.

[Illegible]

IV. ~~That unless either party hereto shall give to the other written notice, by legal service, of intention to terminate this agreement prior to the end of the term hereinbefore stipulated, this agreement shall continue upon the same terms and conditions, subject to termination as in this agreement provided, for a further term of _____ and so on thereafter from _____ to _____ until terminated by either party hereto giving to the other written notice, by legal service,~~ **[Illegible]**

(Additional Provisions written in this space to be designated V(a), V(a), etc.)

V. That if the whole or any portion of the building of which the said space is part shall be taken or condemned by any competent authority, Licensor shall have the right to terminate this agreement at any time by giving Licensee not less than ten days notice in writing of Licensor's intention so to do, and thereupon this agreement shall cease, terminate and come to an end on the date specified in said notice.

V. (a) That unless either party hereto shall give to the other written notice, by legal service, of intention to terminate this agreement one hundred eighty (180) days prior to the end of the term hereinbefore stipulated, this agreement shall continue upon the same terms and conditions, subject to termination as in this agreement; provided, for a further term of one (1) year and so on thereafter from year to year, or such other longer term as may be approved by Licensor, until terminated by either party hereto giving to the other one hundred eighty (180) days written notice, by legal service, prior to the expiration of the then current term.

V. (b) That during the initial term of this agreement Licensee may retain each month out of Lessor's cut of gross receipts an amount equal to one thirty third (1/33rd) of the $61,000.00, and apply same to reimburse itself the cost of $61,000.00 for construction and installation of said advertising spectacular, plus a sum equal to six per cent (6%) per annum, calculated monthly, on the unreimbursed portion of said $61,000.00 Licensee shall indicate on the statement of Licensee's gross receipts as hereinbefore mentioned the amount retained by it during each month until the cost has been completely reimbursed. Upon complete reimbursement Licensee shall then pay the full per centum rental as required under this agreement.

V. (c) That in the event of termination by the Licensor as provided for in paragraph III and V, page 5 hereof, prior to complete reimbursement of the cost of erecting the said advertising spectacular, Licensor hereby covenants and agrees to reimburse Licensee, upon the surrender of the space and removal therefrom, for the reimbursed cost of erecting said advertising spectacular.

V. (d) That upon completion of reimbursement provided in Paragraph 5. (b) the advertising spectacular shall become the property of the Licensor and Licensor will not reimburse

the Licensee for any part of the cost incurred therewith.

V. (e) That the rent and additional charges during any holdover period shall be adjusted to reflect the economic facts as then exist. In no event will the rental be less than 60% of gross receipts of $102,000 per annum.

V. (f) That at the expiration of this agreement and the term therein, or any renewal thereof, Licensee shall be responsible, at its own cost and expense, for the removal of all advertising material and equipment not owned by Licensor.

Licensor's Remedy in Event of Licensee's Default

VII. That in the event Licensee shall fail to pay the compensation when due or shall in any other respect violate any of the conditions or covenants herein contained, Licensor shall have the right to terminate this agreement forthwith and reoccupy said space and remove all persons therefrom and to remove from said space and store without liability for safekeeping any and all materials, property and merchandise thereon not owned by Licensor and remove and dispose of all waste, rubbish and debris, all of which shall be performed at the expense of Licensee, which expense Licensee hereby expressly agrees to pay to Licensor promptly on demand, and for the purpose of such reoccupancy and repossession. Licensee hereby waives any notice, prescribed by law or otherwise, to vacate said space.

Not a Joint Enterprise

VIII. That nothing in this agreement contained shall be interpreted or construed as constituting a joint enterprise between Licensor and Licensee.

Licensee to Observe Rules and Regulations

IX. Licensor's Rules and Regulations attached to this agreement and such alterations and additions thereto and modifications thereof as may from time to time be made by Licensor, shall be considered a part of this agreement, with the same effect as though written herein and Licensee covenants that the same shall be faithfully observed by Licensee and the employees of Licensee; the right is hereby expressly reserved by Licensor to add to, alter, modify or rescind, from time to time, such rules and regulations.

Notices by Registered Mail

X. That any notice given under the terms of this agreement shall be deemed sufficient to meet the requirements thereof as legal service, if served by Certified or Registered United States mail, such notice to be computed from date of mailing.

No Waiver of Specific Performance

XI. That any failure on the part of Licensor to compel to fulfillment of any one or more of the covenants, terms and conditions herein contained shall not be held to be a waiver of its right to enforce the same at any time during the continuance of this agreement.

Licensee Declare

XII. That the word Licensee as used herein shall be construed to include the plural as well as the singular; and the necessary grammatical changes required to make the provisions hereof apply to either corporations or individuals, masculine or feminine, shall in all cases be assumed as though herein fully expressed.

Successors and Assigns

That all rights and liabilities herein given to or imposed upon either of the parties hereto shall extend to the heirs, executors, administrators, successors and assigns of such party; provided, however, this provision shall not be construed to

modify or nullify the provisions of Paragraph 5 hereof.

IN WITNESS Whereof, Licensor has hereunto affixed its corporate seal, duly attested, and Licensee has caused this agreement to be duly executed, the day and year first above written.

All additions and deletions hereto were made prior to execution by either party

THE PENNSYLVANIA RAILROAD COMPANY, Lessee

Sealed and delivered in the presence of us.

(Two witnesses to each party, except corporations in states other than Ohio.)

By: /s/ [ILLEGIBLE]

Attest:

TRANSPORTATION DISPLAYS, INC.

By: /s/ [ILLEGIBLE]
President

Attest:/s/ [ILLEGIBLE]
Secretary

RULES AND REGULATIONS

1. The entrances, passageways, stairways and elevators shall not be obstructed by Licensee or used by it for any other purpose than for ingress and egress to and from the space described in this agreement. Licensee is requested to give to the Superintendent or watchman immediate notice of any canvassers, newsboys, peddlers, beggars or unauthorized bootblacks seeking to ply their trade in the building, with a view of the prevention of the same.

2. Licensor in all cases shall have the right to prescribe the method and manner in which any merchandise, heavy furniture, fixtures or safes shall be brought into or taken out of the building, and also the hours at which such moving shall be done. Licensor in all cases shall retain the right to prescribe the maximum weight and proper position of such merchandise, heavy furniture, fixtures and safes, and all damage done to the building by moving such merchandise, heavy furniture, fixtures or safes into or out of the building while said property shall be therein, and as a result thereof, shall be made good and paid for by Licensee.

3. Licensor reserves to itself the exclusive right to specify the color, size, style and location of all signs, advertisements, notices or other devices for advertising Licensee's business and no sign, advertisement, notice or other device shall be placed upon the premises without the written consent of Licensor first had and obtained.

4. If Licensee desires to introduce signalling, telegraphic, telephonic, or other wires and instruments, Licensor will direct the electricians as to where and how same are to be placed, and without such directions, no placing of instruments, or boring or cutting for wires will be permitted. Licensor shall in all cases retain the right to require the placing and using of such electrical protecting devices to prevent transmission of excessive currents of electricity into or through the building, and to require the changing of wires and of their placing and arrangement as Licensor may deem nec-

essary, and further to require compliance on the part of all using, or seeking access to such wires with such rules, as Licensor may establish relating thereto, and in the event of non-compliance with such requirements and rules, Licensor shall have the right to immediately cut and prevent the use of such wires. Notice requiring such changing of wires and their replacing and rearrangement given by Licensor to any company or individual furnishing service by means of such wires to Licensee, shall be regarded as notice to Licensee and shall take effect immediately. All wires used by Licensee must be clearly tagged at the distributing boards and junction boxes and elsewhere in the building with the number of the shop to which such wires lead, and the purpose for which said wires respectively are used, together with the name of the company operating same. All cost and expenses incurred in connection with any and all of the work contemplated by this paragraph shall be paid by Licensee, who shall be solely responsible and liable for any and all damages to persons and property that may occur in connection with or by reason of same. Licensees desiring to put in telephone or call boxes will notify Licensor, who will designate where the same shall be placed. No mechanics shall be allowed in or about the building other than those employed by Licensor, without the written consent of Licensor first having been obtained.

5. Licensor or its agents shall have the right to enter the said space at any time to examine the same, or to run telegraph or other electric wires, or to make such repairs, additions and alterations as it shall deem necessary, for the safety, improvement, preservation and restoration of the said building, or for the safety or convenience of the occupants thereof, or passengers of Licensor and the traveling public and also to exhibit the said space to be let or put upon them the normal notice of "To Let" during the three months previous to the expiration of this agreement and said notice shall not be removed or obliterated by Licensee.

6. No linoleum, oil cloth, rubber or other air-tight covering shall be laid upon the floors without the written consent

of Licensor, nor shall articles be fastened to, or holes drilled, or nails or screws driven into the walls or partitions nor shall the walls or partitions be painted, papered or otherwise covered, or in any way marked or broken. No machinery of any kind shall be operated in the said space.

7. The toilet rooms, water-closets and other water apparatus shall not be used for any purpose other than those for which they were constructed and no sweepings, rubbish, rags, ashes, chemicals, refuse from electric batteries or other unsuitable substances shall be thrown into them. Any damage resulting from such misuse or abuse shall be borne and immediately paid by the person or corporation by whom or by whose employee it is caused.

8. Licensee shall not do or permit anything to be done in the said space, or bring or keep anything therein which will in any way increase the rate of fire insurance on the said building or on property kept therein or conflict with the laws relating to fires, or with the regulations of the Municipal Fire Department or Licensor's Insurance Department or with any insurance policy upon the said building or any part thereof, or conflict with any of the rules and ordinances of the Board of Health, or obstruct or interfere with the rights of others or in any way injure or annoy them.

9. Licensee shall not use or keep in the building any explosives, kerosene, gasoline, benzine, camphene, burning fluid or other illuminating material, except electric lights and candles.

10. The use of the premises as sleeping apartments is absolutely prohibited, and no animals or birds will be allowed in or about the premises.

11. Licensor reserves the right to rescind any of these rules and to make such other and further rules and regulations as in its judgment, may from time to time be needful for the safety, care and cleanliness of the building and for the preservation of good order therein, which rules, when so made and notice thereof is given to Licensee, shall have the same force and

effect as if originally made a part of the foregoing agreement. Such other and further rules, however, shall be consistent with the proper and rightful enjoyment by Licensee under the foregoing agreement of the space therein referred to, or the privilege therein accorded.

RENT NUMBER 28 11640

31 01 047

License

(STATION CONCESSION)

THE PENNSYLVANIA RAILROAD COMPANY,
Lessee

To

TRANSPORTATION DISPLAYS, INC.
Space: Advertising spectacular over ticket counter,
Ticket Concourse, Pennsylvania Station, New York, N.Y.

Rental: 60% of gross receipts

Agreement occurrence 1/1/67
Former Occupant None
Agreement forwarded

General Contract Record

Reg. No. 159-857
Registered Feb 23 1971

ICC-NY-Mass Cam __x__

Calendar __x__

PLAINTIFF'S EXHIBIT 37

JUSTIFICATION OF SPECTACULAR SIGN AGREEMENT TO A&S DEPARTMENT STORES

Prepared by: Bruce Bourque Date: 8/20/87
Real Estate Division

Location: Level B, Pennsylvania Station, New York

Prior Use and Rental: Advertising sign; $79,560 (12 months)

Area of Use: 1,000 square foot sign located above the old ticket counter.

Proposed use: Same

Fee: Monthly Minimum Rent: $ 2,600 First 2 months
$ 6,338 Next 6 months
$ 8,775 Final 12 months
Aggregate Minimum Rent: $148,525
Utilities Charge: $ 2,200 per month

Term: 1-1/2 years; Tenant has a one-year option to extend the term to June 1, 1990, subject to Amtrak's approval of both the business terms and copy, at the lesser of $9,477 or the 1989 renewal rate.

Method of Selection: Winston Network Incorporated Advertising Agency

Business Justification: Increased annual rental by 20% or $19,500 over former agreement with Nike, which expired in March 1987.*

Modifications of Standard Form: None

Approvals: Price & Terms: _____
Office of General Counsel: AA 8/25/87
AVP-Real Estate: _____
Executive Vice President _____

*See comments attached.

ATTACHMENT

JUSTIFICATION OF SPECTACULAR SIGN AGREEMENT TO A&S DEPARTMENT STORES

COMMENTS:

Amtrak had received rental of $79,560 per annum from Nike Athletic Shoes under an advertising agreement that expired in March 1987.

A&S Department Stores will pay rental of $148,525 for a one and one-half year advertising agreement, a 20% increase over the Nike agreement.

I recommend that we accept the A&S Department Store proposal.

PLAINTIFF'S EXHIBIT 38

[LETTERHEAD OF WINSTON NETWORK, INC.]

September 14, 1987

Federal Express:

Mr. Bruce Bourque
National Railroad Passenger Corporation
400 North Capitol Street
Washington, D.C. 20001

Dear Bruce:

Enclosed please find a black and white stat of the A&S spectacular sign. This copy will be prepared once approved by you to be installed on October 1, 1987.

Please call as soon as you have obtained Amtrak's approval, so that I may get back to the agency with your response.

Thank you for your cooperation.

Very truly yours,

/s/ VINCENT NOTARO
Vincent Notaro
Senior Vice President

/cmb

Enclosure:

* * *

PLAINTIFF'S EXHIBIT 45

[LETTERHEAD OF TDI]

October 10, 1979

Mr. Ken Simpson
AMTRAK
One Penn Plaza
New York, New York 10001

Dear Ken:

As I mentioned early in July, DuPont has notified us that they will not renew their contract for the space they currently occupy for their Spectacular in Penn Station after December 31, 1979.

We have since resold this space to the Atlantic City Resorts Hotels. The contract with them will run for five (5) years commencing January 1, 1980, with the first year space cost being $13,000 per month. The second, third, fourth, and fifth years there are incremental increases of $500 per month in each year, ending up in the fifth year at $15,000. Besides the space cost, the advertiser will pay for the cost of all electrical service charges billed to us by AMTRAK.

I would like to stress the importance of the timing involved in preparing and producing a large transparency of this size. Therefore, it is very important that we take time to sit down and discuss this matter next week.

I will be calling you early to set up on appointment at your convenience.

Sincerely,

/s/ VINCENT NOTARO
Vice President

Vincent Notaro
vl

PLAINTIFF'S EXHIBIT 48

[LETTERHEAD OF TDI, WINSTON NETWORK, INC.]

May 26, 1983

Mr. Kurt Weissheimer,
Senior Director
Amtrak
National Railroad Passenger Corp.
400 N. Capitol Street, N.W.
Washington, D.C. 20001

RE: Penn Station Spectacular

Dear Kurt:

We have received a contract for the spectacular location at Penn Station New York.

Effective September 1, 1983 Fijitsu would like to occupy the space for a period of twelve months. The gross monthly rate for this contract is $10,000.00. The net rate after agency commissions is $8,500.00 per month, of which the railroad's share based on our 65% revenue sharing agreement comes to $5,525.00 per month. I am expecting to receive a rough sketch of the actual display at which time I will send to you for final approval.

If you have any questions regarding this contract, please do not hesitate to call.

Sincerely,

/s/ VINCENT NOTARO
Vincent Notaro
Senior Vice President

VN/ps

cc: F. Tierney

[LETTERHEAD OF TDI, WINSTON NETWORK, INC.]

August 2, 1983

Mr. Kurt Weissheimer
Senior Director
Amtrak
400 North Capitol Street, N.W.
Washington D. C. 20001

Re: Penn Station Spectacular

Dear Kurt:

We have finally received a lay-out of the Fujitsu display spectacular for Penn Station, New York. This color comp is merely to show the layout of the components they will be using to make up the transparency.

I would appreciate your approval, as soon as possible, so that we may inform the client to proceed with the production.

Sincerely,

/s/ VINCENT NOTARO
Vincent Notaro
Senior Vice President

VN/dm

[LETTERHEAD OF TDI, WINSTON NETWORK, INC.]

September 26, 1983

Mr. Kurt Weissheimer
Amtrak
400 North Capitol St., NW
Washington D. C. 20001

Dear Kurt:

On August 2, 1983, I originally sent to you a rough comp of the Fugitsu display for Penn Station asking your copy approval, I had no idea it would take this long to receive a positive answer from you.

The contract originally commenced on September 1, 1983. Because, we were unable to receive your approval, Amtrak has lost a months equity which, as you know, would have been $5,525.00.

The original comp sent to you was strictly to show you that Fugitsu dealt only with computers and there would have been no problem with suitability and taste.

I have expressed to the agency your dissatisfaction with the initial comp. The President of the agency wishes to discuss this matter with you and he is willing to fly to Washington to meet with you at your convenience at which time, he would like to show and discuss with you additional lay-outs which may be more to your satisfaction. I am enclosing xerox copies of these new rough ideas.

I would appreciate your calling me upon receipt of this letter so that we may set up a meeting in Washington or here in New York, if you are coming to town.

Sincerely,

/s/ VINCENT NOTARO
Vincent Notaro
Senior Vice President

VN/dm

* * *

[LETTERHEAD OF AMTRAK]

March 23, 1984

Mr. Vince Notaro
Senior Vice President
Winston Network, Inc.
275 Madison Avenue
New York, NY 10016

RE: Spectacular Sign -
Penn Station, New York

Dear Vince,

Please be advised that the "Manhattan Skyline" design sketch, as submitted to Amtrak by Livingston/Sirutis on February 17, 1984, is acceptable for the Fujitsu Display on the Penn Station New York Spectacular Sign. Kindly provide the full text of the advertisement as soon as it becomes available. The present monthly utility charge for the Spectacular sign is $2,150 and the permit covering the display expires December 31, 1984.

Very truly yours,

/s/ PAUL MENK
Paul Menk
Project Manager
Real Estate Development

1192.1693/moy

[LETTERHEAD OF AMTRAK]

April 18, 1985

Mr. Vince Notaro
Senior Vice President
Winston Network, Inc.
275 Madison Avenue
New York, New York 10016

RE: Spectacular, Penn Station, NY

Dear Vince:

The following is in response to your letter dated April 16, 1984. Amtrak has reviewed and does hereby approve the stat of the temporary sign which Fujitsu proposes to place on the Spectacular at Penn Station, New York.

The showing of this temporary sign is also hereby approved, but only for the twenty-nine calendar days immediately preceding the placement of "Manhattan Skyline" on the Spectacular.

Very truly yours,

/s/ PAUL MENK
Paul Menk
Project Manager
Real Estate Development

PLAINTIFF'S EXHIBIT 49

[LETTERHEAD OF WINSTON NETWORK, INC.]

July 23, 1987

Mr. Bruce Bourque
National Railroad Passenger Corp.
400 North Capitol Street
Washington, DC 20001

Re: Penn Station Spectacular

Dear Bruce:

As discussed, recently the A&S department store has shown great interest in the leasing of this Spectacular sign at Penn Station.

The store will not open until the summer of 1988. They still have contracted with us for a twelve (12) month period starting on June 1, 1988. This contract is for $13,500 per month and is contingent upon them renewing for another twelve (12) months in 1989. If they choose not to renew for another year, they will have to pay an additional $500 per month short rate charge. They are also responsible for the $2,200 monthly electrical charge.

The two (2) other contracts enclosed are also contracts for A&S who wish to install a temporary sign earlier. Therefore, we have given them a special rate commencing October 1st and another commencing December 1st. This temporary sign will also be subject to your approval.

They are in the process of preparing the artwork for submission. As soon as I receive it, I will send it on for your approval.

If you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ VINCENT NOTARO
Vincent Notaro
Senior Vice President

VN:DM

cc: Mike Leible
Jeanine Crescimanno

[LETTERHEAD OF WINSTON NETWORK, INC.]

August 13, 1987

Mr. Bruce Bourque
National Railroad Passenger Corp.
400 North Capitol Street
Washington, DC 20001

Dear Bruce:

Enclosed is a xerox copy and the letter sent to Abraham & Strauss regarding the Penn Station Spectacular change.

We have inserted in the comment section the line that Amtrak must approve the 1989 renewal.

We have notified Abraham & Strauss that they should now go ahead and produce artwork for Amtrak's approval.

As soon as I receive this artwork, I will send it on to you.

Sincerely,

/s/ VINCENT NOTARO
Vincent Notaro
Senior Vice President

VN:DM

Enc.

PLAINTIFF'S EXHIBIT 51

[LETTERHEAD OF AMNI]

August 23, 1989

Mr. Bruce Bourque
Project Manager
National Railroad Passenger Corp.
400 North Capitol Street, N.W.
Washington, DC 20001

Re: Penn Station Spectacular

Dear Bruce:

Attached is a stat of the next A&S copy, scheduled for installation the first week in September. It is simply the next step in the progression. The production company is holding off pending approval. Since the copy *must* be ready by the end of August, it is important that I hear from you as quickly as possible.

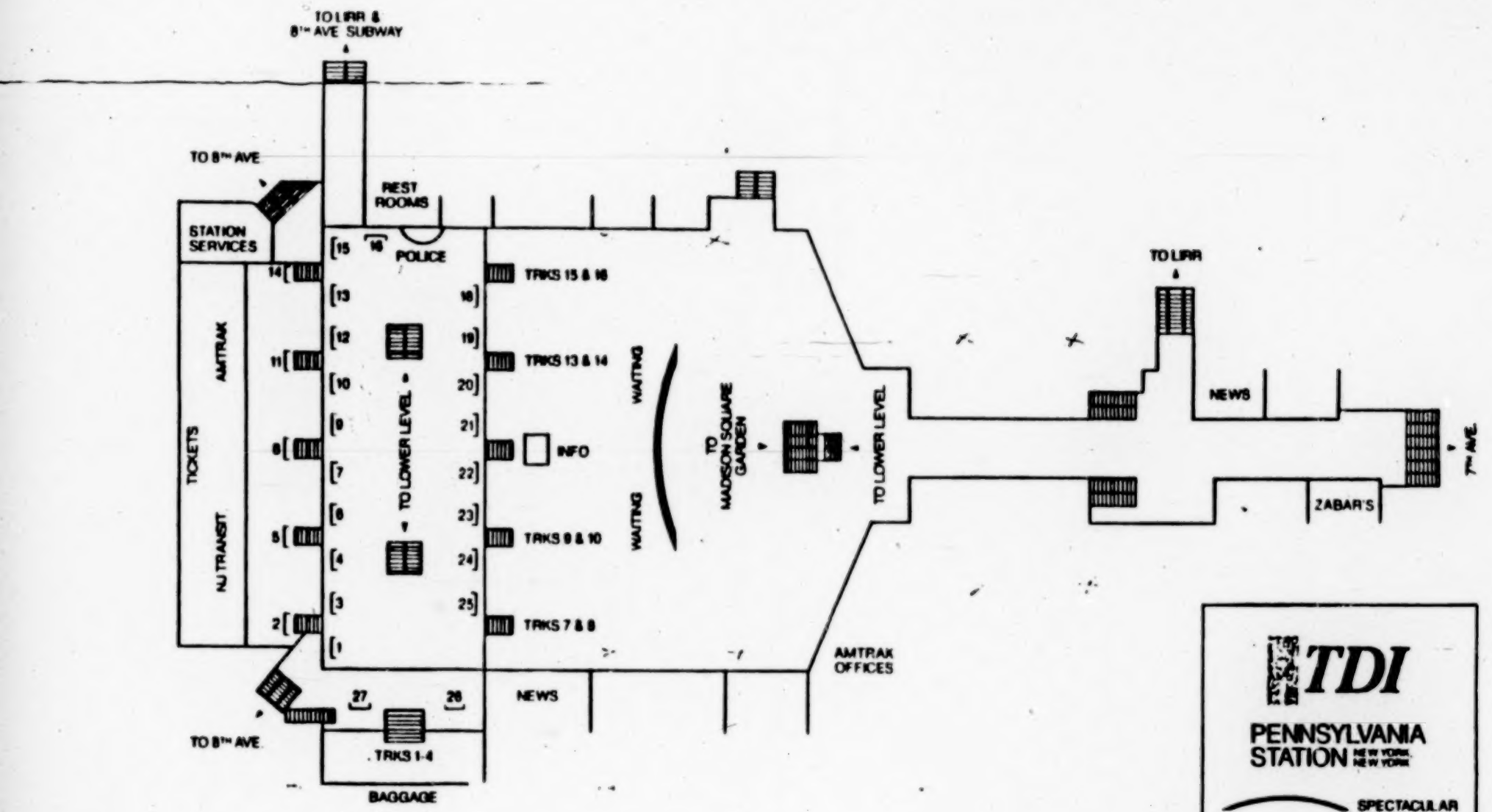
I still have not received official approval for the Sharp Electronics Exhibit. There has been another schedule change, the start date is now September 15, 1989 with the exhibit closing October 1, 1989. Please advise me of your approval.

Very truly yours,

/s/ RICHARD AMENT
Richard Ament
Asst. Vice President

cc: Vince Notaro

PLAINTIFF'S EXHIBIT 54



DEPOSITION EXHIBIT
P-54
1-21-93
NOON & PRATT

PLAINTIFF'S EXHIBIT
54

101-0

FINANCE NEW·YORK
THE CITY OF NEW YORK
DEPARTMENT OF FINANCE

BOROUGH OF MANHATTAN
TAX YEAR 1992 - 1993

OWNER OF RECORD	ADDRESS OF PROPERTY
NATL RR PASS CORP	IDENT. NO. 2317

1823170011l

IDENT. NO. 2317
NATL RR PASS CORP
400 N CAPITOL ST NW
WASHINGTON DC 20001

BLOCK	LOT	C
82317	11	6

CHECK BLOCK AND LOT NUMBER

307

PROPERTY TYPE/CODE FULLY EXEMPT PROPERTIES PRIVAT /X

NOTIFY THE BOROUGH PROPERTY ASSESSMENT OFFICE IF THE OWNER OF RECORD OR DESCRIPTION OF PROPERTY ABOVE IS INCORRECT OR MISSING. SEE REVERSE SIDE FOR ADDRESSES

DETAIL OF BILL

	ASSESSED VALUE	55,000
	EXEMPT VALUE	55,000*
	TAXABLE VALUE	0
	REAL ESTATE RATE PER $100	10.698**
A -	REAL ESTATE TAX	.00
	ASSESSED VALUE SUBJECT TO SCHOOL TAX	0
	SCHOOL RATE PER $100	00.000
B -	SCHOOL TAX	.00
	TOTAL TAX EQUALS A + B	.00
	SEMI-ANNUAL AMOUNT DUE	.00

* DETAILS OF EXEMPT VALUE
EXMT STATE LANDS & BLDGS - 55,000

TOTAL DISCOUNT IF PAID ON OR BEFORE JULY 1, 1992 .00

**.175 OF WHICH PUTS MORE POLICE ON OUR STREETS

REAL PROPERTY TAX LAW PROVIDES THAT TAXES ARE TO BE BASED ON THE LOWER OF THE TRANSITION OR ACTUAL ASSESSED VALUE

FOR ADDITIONAL INFORMATION SEE REVERSE SIDE

PAYMENT PERIODS

YOUR PAYMENTS ARE DUE IN 2 INSTALLMENTS ON JULY 1, 1992, JANUARY 1, 1993

INTEREST

If payment on installment is not made by the due date or the end of the grace period (if any), interest will be charged at the rate of 9% per annum compounded daily from the original due date of the installment

DISCOUNTS

Except for the first installment, a 2.00% discount per annum will be allowed for early payment of installments. See reverse side for details.

PROTESTS

The period for protesting assessed valuation for 1993/94
1, 2, & 3 family dwellings: JANUARY 15, 1993 TO MARCH 15, 1993
All others: JANUARY 15, 1993 TO MARCH 1, 1993

OTHER INFORMATION

Estimated local assistance from New York State during 1992/93 - $6,189,617,607

DO NOT MAIL CASH!

Make check or money order payable to NYC DEPT. OF FINANCE. Please write borough, block, and lot no. on check. Your cancelled check is your receipt. Statements of account will be mailed twice a year. A $15.00 service charge will be assessed for each dishonored check. Cash payments may be made at any borough office of the City Collector, Mon. - Fri. 9am to 3pm

RETAIN THIS PORTION FOR YOUR RECORDS

R192 CT

FOR FULL YEAR PAYMENT USE THIS COUPON

PLAINTIFF'S EXHIBIT 56

PLAINTIFF'S EXHIBIT 56

BILL FOR REAL ESTATE TAXES

SENIOR CITIZEN TAX EXEMPTION

You may be eligible for a senior citizen tax exemption. Senior citizens must apply for such exemptions between January 15 and March 15. For information, please contact the Property Assessment Offices at the addresses listed below.

THIRD PARTY NOTIFICATION

The Real Property Tax Law provides that any taxpayer who owns residential real property consisting of no more than three family dwelling units and is age sixty-five or over or is disabled, is eligible for a third party notification of a consenting adult to receive duplicate tax bills or delinquency notices.

Appropriate application forms and further information may be obtained by calling Taxpayer Assistance or by visiting a Borough Office of the City Collector.

UNPAID CHARGES

If our records indicate that this property has unpaid charges, you should have recently received a statement itemizing these previous taxes, assessments, sewer rents/sewer surcharges, water charges or other legal charges which remain unpaid as of the date indicated. If you did not receive a statement, please call Taxpayer Assistance.

GRACE PERIOD

Under a local law passed in 1989, the 15-day interest-free period allowed for the payment of real property taxes was eliminated for any real property assessed at more than $40,000 and any realty, regardless of its assessment, with respect to which the real estate taxes are held in escrow and paid over to the City by a mortgage escrow agent. (For cooperatively-owned property, the 15-day grace period will be available if the assessed value divided by the number of dwelling units in the building is not more than $40,000, unless the taxes are escrowed.) For all other properties, the 15-day grace period remains in effect.

CASH PAYMENTS

Cash payments may be made at any borough Office of the City Collector, Monday - Friday from 9am to 3pm.

DISCOUNT

No discount is allowed on the first installment. See front of bill for rate of annual allowable discount and for the total amount that can be deducted if the full year is paid on or before July 1. For properties whose assessed value is not more than $40,000 and for properties whose taxes are paid by a party other than a mortgage escrow agent, the discount on subsequent quarters is calculated from July 1, or date paid, whichever is later, provided payment is made not later than 15 days prior to the due date, and for all other properties, not later than 30 days prior to the due date; and prior installments shall have been paid or shall be paid at the same time.

DETERMINATION OF ASSESSED VALUE

Specific questions regarding how the assessed value of the property was determined should be addressed to the Property Assessment Offices. Protest applications for the following tax year can also be obtained from these Offices.

IN REM

If you own a one- or two- family home, including condominiums, where the annual tax is $2,750 or less, and if any tax or other legal charge remains unpaid for three years, your property may be foreclosed. For all other properties, if any tax or other legal charge remains unpaid for one year, your property may be foreclosed.

INFORMATION

✆ For general information regarding this bill, or *interest/discount* calculations, please call **TAXPAYER ASSISTANCE** at ***(718) 935-9500***.

Property Located In	Property Assessment Offices	Offices of City Collector
Manhattan	Manhattan Municipal Building 1 Centre Street - 9th Floor New York, N.Y. 10007 Telephone: *(212) 669-4896*	150 Nassau Street - 5th Floor New York, N.Y. 10038 Telephone: *(718) 935-9500*
Bronx	Bergen Building 1932 Arthur Avenue - 7th Floor Bronx, N.Y. 10457 Telephone: *(212) 579-6879*	Bergen Building 1932 Arthur Avenue - 1st Floor Bronx, N.Y. 10457 Telephone: *(718) 935-9500*
Brooklyn	Brooklyn Municipal Building 210 Joralemon Street - Room 200 Brooklyn, N.Y. 11201 Telephone: *(718) 802-3550*	Brooklyn Municipal Building 210 Joralemon Street - Room 1 Brooklyn, N.Y. 11201 Telephone: *(718) 935-9500*
Queens	90-25 Sutphin Blvd. - 3rd Floor Jamaica, N.Y. 11435 Telephone: *(718) 658-4626*	90-15 Sutphin Blvd. - 1st Floor Jamaica, N.Y. 11435 Telephone: *(718) 935-9500*
Staten Island	350 St. Marks Place - Room 203 Staten Island, N.Y. 10301 Telephone: *(718) 390-5295*	350 St. Marks Place - Room 200 Staten Island, N.Y. 10301 Telephone: *(718) 935-9500*

BILL FOR REAL ESTATE TAXES SEE COUPONS BELOW

THIS INSTALLMENT DUE:

Please print any corrections to this name or address

THIS IS NOT A BILL
DO NOT SUBMIT WITH PAYMENT
SEE COUPONS BELOW

B	YR	C	BLOCK	LOT	C	C	AMOUNT DUE
1	2	0	11	82317	11	b	D XXXXXXXXXXXXXX
				PAY THIS AMOUNT >>>>			XXXXXXXXXXXXXX

TO INSURE PROPER CREDIT, DETACH THIS COUPON AND MAIL WITH PAYMENT TO THIS ADDRESS

Make check or money order payable to: NYC DEPT. OF FINANCE.
Please write borough, block, and lot no. on check.

BILL FOR REAL ESTATE TAXES SEE COUPONS BELOW

THIS INSTALLMENT DUE:

Please print any corrections to this name or address

THIS IS NOT A BILL
DO NOT SUBMIT WITH PAYMENT
SEE COUPONS BELOW

B	YR	C	BLOCK	LOT	C	C	AMOUNT DUE
1	2	0	11	82317	11	b	D XXXXXXXXXXXXXX
				PAY THIS AMOUNT >>>>			XXXXXXXXXXXXXX

TO INSURE PROPER CREDIT, DETACH THIS COUPON AND MAIL WITH PAYMENT TO THIS ADDRESS

Make check or money order payable to: NYC DEPT. OF FINANCE.
Please write borough, block, and lot no. on check.

1ST HLF BILL FOR REAL ESTATE TAXES MANHATTAN — TAX YEAR 92-93

1118231700116000000007019200000000000000000000000000000000000000006

THIS INSTALLMENT DUE:
DUE DATE 07/01/92
INT. CHARGED AFTER 07/17/92

Please print any corrections to this name or address

IDENT. NO. 2317
NATL RR PASS CORP
400 N CAPITOL ST NW
WASHINGTON DC 20001

B	YR	C	BLOCK	LOT	C	C	AMOUNT DUE
1	2	1	11	82317	11	b	D .00
				PAY THIS AMOUNT >>>>			.00

TO INSURE PROPER CREDIT, DETACH THIS COUPON AND MAIL WITH PAYMENT TO THIS ADDRESS

P.O. BOX 3121
NEW YORK, NY 10008-3121

Make check or money order payable to: NYC DEPT. OF FINANCE.
Please write borough, block, and lot no. on check.

2ND HLF BILL FOR REAL ESTATE TAXES MANHATTAN — TAX YEAR 92-93

1118231700116000000001019300000000000000000000000000000000000000007

THIS INSTALLMENT DUE:
DUE DATE 01/01/93
INT. CHARGED AFTER 01/01/93

Please print any corrections to this name or address

IDENT. NO. 2317
NATL RR PASS CORP
400 N CAPITOL ST NW
WASHINGTON DC 20001

B	YR	C	BLOCK	LOT	C	C	AMOUNT DUE
1	2	3	11	82317	11	b	D .00
				PAY THIS AMOUNT >>>>			.00

P.O. BOX 3121
NEW YORK, NY 10008-3121

TOTAL DISCOUNT IF PAYING FOR FULL YEAR ON OR BEFORE		
	FULL YEAR TAX	.00
	DISCOUNT	.00
07/01/92	NET PAYABLE	.00

FINANCE NEW·YORK
THE CITY OF NEW YORK
DEPARTMENT OF FINANCE

BOROUGH OF MANHATTAN
TAX YEAR 1992 - 1993

OWNER OF RECORD	ADDRESS OF PROPERTY
NATL RR PASS CORP	IDENT. NO. 2316

18231600111

IDENT. NO. 2316
NATL RR PASS CORP
400 N CAPITOL ST NW
WASHINGTON DC 20001

BLOCK	LOT	C
82316	11	8

CHECK BLOCK AND LOT NUMBERS

48

PROPERTY TYPE/CODE FULLY EXEMPT PROPERTIES PRIVAT /X

NOTIFY THE BOROUGH PROPERTY ASSESSMENT OFFICE IF THE OWNER OF RECORD OR DESCRIPTION OF PROPERTY ABOVE IS INCORRECT OR MISSING SEE REVERSE SIDE FOR ADDRESSES

DETAIL OF BILL

ASSESSED VALUE	6,900
EXEMPT VALUE	6,900*
TAXABLE VALUE	0
REAL ESTATE RATE PER $100	10.698**
A - REAL ESTATE TAX	.00
ASSESSED VALUE SUBJECT TO SCHOOL TAX	0
SCHOOL RATE PER $100	00.000
B - SCHOOL TAX	.00
TOTAL TAX EQUALS A + B	.00
QUARTERLY AMOUNT DUE	.00

* DETAILS OF EXEMPT VALUE
EXMT STATE LANDS & BLDGS 6,900

TOTAL DISCOUNT IF PAID ON OR BEFORE JULY 1, 1992 .00

**.175 OF WHICH PUTS MORE POLICE ON OUR STREETS

REAL PROPERTY TAX LAW PROVIDES THAT TAXES ARE TO BE BASED ON THE LOWER OF THE TRANSITION OR ACTUAL ASSESSED VALUE

FOR ADDITIONAL INFORMATION SEE REVERSE SIDE

PAYMENT PERIODS

YOUR PAYMENTS ARE DUE IN 4 INSTALLMENTS ON: JULY 1, 1992, OCTOBER 1, 1992, JANUARY 1, 1993 AND APRIL 1, 1993

INTEREST

If payment on installment is not made by the due date or the end of the grace period (if any), interest will be charged at the rate of 9% per annum compounded daily from the original due date of the installment.

DISCOUNTS

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PROTESTS

The period for protesting assessed valuation for 1993/94
1, 2, & 3 family dwellings: JANUARY 15, 1993 TO MARCH 15, 1993
All others: JANUARY 15, 1993 TO MARCH 1, 1993

OTHER INFORMATION

Estimated local assistance from New York State during 1992/93 - $6,189,617,607

DO NOT MAIL CASH!

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RETAIN THIS PORTION FOR YOUR RECORDS

R182 CT

FOR FULL YEAR PAYMENT USE THIS COUPON

FINANCE NEW·YORK
THE CITY OF NEW YORK
DEPARTMENT OF FINANCE

BOROUGH OF MANHATTAN
TAX YEAR 1992 - 1993

OWNER OF RECORD	ADDRESS OF PROPERTY
NATL. RR PASSENGER CORP	IDENT NO.2315

1823150011l

IDENT NO.2315
NATL. RR PASSENGER CORP
400 N CAPITOL ST NW
WASHINGTON DC 20001

BLOCK	LOT	C
82315	11	0

CHECK BLOCK AND LOT NUMBER:

47

PROPERTY TYPE/CODE FULLY EXEMPT PROPERTIES PRIVAT /X

NOTIFY THE BOROUGH PROPERTY ASSESSMENT OFFICE IF THE OWNER OF RECORD OR DESCRIPTION OF PROPERTY ABOVE IS INCORRECT OR MISSING SEE REVERSE SIDE FOR ADDRESSES

DETAIL OF BILL

	ASSESSED VALUE	33,000
	EXEMPT VALUE	33,000*
	TAXABLE VALUE	0
	REAL ESTATE RATE PER $100	10.698**
A -	REAL ESTATE TAX	.00
	ASSESSED VALUE SUBJECT TO SCHOOL TAX	0
	SCHOOL RATE PER $100	00.000
B -	SCHOOL TAX	.00
	TOTAL TAX EQUALS A + B	.00
	QUARTERLY AMOUNT DUE	.00

* DETAILS OF EXEMPT VALUE
EXMT STATE LANDS & BLDGS. - 33,000

TOTAL DISCOUNT IF PAID ON OR BEFORE JULY 1, 1992 .00

**.175 OF WHICH PUTS MORE POLICE ON OUR STREETS

REAL PROPERTY TAX LAW PROVIDES THAT TAXES ARE TO BE BASED ON THE LOWER OF THE TRANSITION OR ACTUAL ASSESSED VALUE

FOR ADDITIONAL INFORMATION SEE REVERSE SIDE

PAYMENT PERIODS

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THE CITY OF NEW YORK
DEPARTMENT OF FINANCE

BOROUGH OF MANHATTAN
TAX YEAR 1992 - 1993

OWNER OF RECORD	ADDRESS OF PROPERTY
NATL RR PASSENGER CORP.	IDENT. NO. 2314

1A2314001l1

IDENT. NO. 2314
NATL RR PASSENGER CORP.
400 N CAPITOL ST. NW
WASHINGTON,DC 20001

BLOCK	LOT	C
02314	11	3

CHECK BLOCK AND LOT NUMBER

306

PROPERTY TYPE/CODE FULLY EXEMPT PROPERTIES PRIVAT /X

NOTIFY THE BOROUGH PROPERTY ASSESSMENT OFFICE IF THE OWNER OF RECORD OR DESCRIPTION OF PROPERTY ABOVE IS INCORRECT OR MISSING SEE REVERSE SIDE FOR ADDRESSES

DETAIL OF BILL

	ASSESSED VALUE	770,000
	EXEMPT VALUE	770,000*
	TAXABLE VALUE	0
	REAL ESTATE RATE PER $100	10.698**
A -	REAL ESTATE TAX	.00
	ASSESSED VALUE SUBJECT TO SCHOOL TAX	0
	SCHOOL RATE PER $100	00.000
B -	SCHOOL TAX	.00
	TOTAL TAX EQUALS A + B	.00
	SEMI-ANNUAL AMOUNT DUE	.00

* DETAILS OF EXEMPT VALUE
EXMT STATE LANDS & BLDGS - 770,000

TOTAL DISCOUNT IF PAID ON OR BEFORE JULY 1, 1992 .00

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PAYMENT PERIODS

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THE CITY OF NEW YORK
DEPARTMENT OF FINANCE

BOROUGH OF MANHATTAN
TAX YEAR 1992 - 1993

OWNER OF RECORD	ADDRESS OF PROPERTY
NATL RR PASS CORP	IDENT. NO. 2313

18231300111

IDENT. NO. 2313
NATL RR PASS CORP
400 N CAPITOL ST NW
WASHINGTON DC 20001

BLOCK	LOT	C
82313	11	5

CHECK BLOCK AND LOT NUMBER

46

PROPERTY TYPE/CODE FULLY EXEMPT PROPERTIES PRIVAT /X

NOTIFY THE BOROUGH PROPERTY ASSESSMENT OFFICE IF THE OWNER OF RECORD OR DESCRIPTION OF PROPERTY ABOVE IS INCORRECT OR MISSING SEE REVERSE SIDE FOR ADDRESSES

DETAIL OF BILL

	ASSESSED VALUE	3,400
	EXEMPT VALUE	3,400*
	TAXABLE VALUE	0
	REAL ESTATE RATE PER $100	10.698**
A -	REAL ESTATE TAX	.00
	ASSESSED VALUE SUBJECT TO SCHOOL TAX	0
	SCHOOL RATE PER $100	00.000
B -	SCHOOL TAX	.00
	TOTAL TAX EQUALS A + B	.00
	QUARTERLY AMOUNT DUE	.00
*	DETAILS OF EXEMPT VALUE	
	EXMT STATE LANDS & BLDGS -	3,400

TOTAL DISCOUNT IF PAID ON OR BEFORE JULY 1, 1992 .00

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DEPARTMENT OF FINANCE

BOROUGH OF MANHATTAN
TAX YEAR 1992 - 1993

OWNER OF RECORD	ADDRESS OF PROPERTY
NATL. RR PASSENGER CORP	IDENT. NO. 2312

18231200111

IDENT. NO. 2312
NATL. RR PASSENGER CORP
400 N CAPITAL ST NW
WASHINGTON DC 20001

BLOCK	LOT	C
82312	11	7

CHECK BLOCK AND LOT NUMBER

305

PROPERTY TYPE/CODE FULLY EXEMPT PROPERTIES PRIVAT /X

NOTIFY THE BOROUGH PROPERTY ASSESSMENT OFFICE IF THE OWNER OF RECORD OR DESCRIPTION OF PROPERTY ABOVE IS INCORRECT OR MISSING SEE REVERSE SIDE FOR ADDRESSES

DETAIL OF BILL

	ASSESSED VALUE	180,000
	EXEMPT VALUE	180,000*
	TAXABLE VALUE	0
	REAL ESTATE RATE PER $100	10.698**
A -	REAL ESTATE TAX	.00
	ASSESSED VALUE SUBJECT TO SCHOOL TAX	0
	SCHOOL RATE PER $100	00.000
B -	SCHOOL TAX	.00
	TOTAL TAX EQUALS A + B	.00
	SEMI-ANNUAL AMOUNT DUE	.00

* DETAILS OF EXEMPT VALUE
EXMT STATE LANDS & BLDGS - 180,000

TOTAL DISCOUNT IF PAID ON OR BEFORE JULY 1, 1992 .00

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THE CITY OF NEW YORK
DEPARTMENT OF FINANCE

BOROUGH OF MANHATTAN
TAX YEAR 1992 - 1993

OWNER OF RECORD	ADDRESS OF PROPERTY
NATL RR PASSENGER CORP	IDENT. NO. 2306

1823060O111

IDENT. NO. 2306
NATL RR PASSENGER CORP
400 N CAPITOL ST NW
WASHINGTON DC 20001

BLOCK	LOT	C
02306	11	9

CHECK BLOCK AND LOT NUMBER

43

PROPERTY TYPE/CODE FULLY EXEMPT PROPERTIES PRIVAT /X

NOTIFY THE BOROUGH PROPERTY ASSESSMENT OFFICE IF THE OWNER OF RECORD OR DESCRIPTION OF PROPERTY ABOVE IS INCORRECT OR MISSING SEE REVERSE SIDE FOR ADDRESSES

DETAIL OF BILL

	ASSESSED VALUE	10,000
	EXEMPT VALUE	10,000*
	TAXABLE VALUE	0
	REAL ESTATE RATE PER $100	10.698**
A -	REAL ESTATE TAX	.00
	ASSESSED VALUE SUBJECT TO SCHOOL TAX	0
	SCHOOL RATE PER $100	00.000
B -	SCHOOL TAX	.00
	TOTAL TAX EQUALS A + B	.00
	QUARTERLY AMOUNT DUE	.00

* DETAILS OF EXEMPT VALUE
EXMT STATE LANDS & BLDGS - 10,000

TOTAL DISCOUNT IF PAID ON OR BEFORE JULY 1, 1992 .00

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THE CITY OF NEW YORK
DEPARTMENT OF FINANCE

BOROUGH OF MANHATTAN
TAX YEAR 1992 - 1993

OWNER OF RECORD	ADDRESS OF PROPERTY
NATL RR PASS CORP	IDENT. NO. 2309

18230900111

IDENT. NO. 2309
NATL RR PASS CORP
400 N CAPITOL ST NW
WASHINGTON DC 20001

BLOCK	LOT	C
82309	11	3

CHECK BLOCK AND LOT NUMBER

45

PROPERTY TYPE/CODE FULLY EXEMPT PROPERTIES PRIVAT /X

NOTIFY THE BOROUGH PROPERTY ASSESSMENT OFFICE IF THE OWNER OF RECORD OR DESCRIPTION OF PROPERTY ABOVE IS INCORRECT OR MISSING. SEE REVERSE SIDE FOR ADDRESSES

DETAIL OF BILL

	ASSESSED VALUE	14,500
	EXEMPT VALUE	14,500*
	TAXABLE VALUE	0
	REAL ESTATE RATE PER $100	10.698**
A -	REAL ESTATE TAX	.00
	ASSESSED VALUE SUBJECT TO SCHOOL TAX	0
	SCHOOL RATE PER $100	00.000
B -	SCHOOL TAX	.00
	TOTAL TAX EQUALS A + B	.00
	QUARTERLY AMOUNT DUE	.00

* DETAILS OF EXEMPT VALUE
EXMT STATE LANDS & BLDGS - 14,500

TOTAL DISCOUNT IF PAID ON OR BEFORE JULY 1, 1992 .00

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THE CITY OF NEW YORK
DEPARTMENT OF FINANCE

BOROUGH OF MANHATTAN
TAX YEAR 1992 - 1993

OWNER OF RECORD	ADDRESS OF PROPERTY
NATL. RR PASSENGER CORP	IDENT. NO. 2307

1A2307001l1

IDENT. NO. 2307
NATL. RR PASSENGER CORP
400 N CAPITOL ST NW
WASHINGTON DC 20001

BLOCK	LOT	C
02307	11	7

CHECK BLOCK AND LOT NUMBER

44

PROPERTY TYPE/CODE FULLY EXEMPT PROPERTIES PRIVAT /X

NOTIFY THE BOROUGH PROPERTY ASSESSMENT OFFICE IF THE OWNER OF RECORD OR DESCRIPTION OF PROPERTY ABOVE IS INCORRECT OR MISSING. SEE REVERSE SIDE FOR ADDRESSES

DETAIL OF BILL

	ASSESSED VALUE	1,500
	EXEMPT VALUE	1,500*
	TAXABLE VALUE	0
	REAL ESTATE RATE PER $100	10.698**
A -	REAL ESTATE TAX	.00
	ASSESSED VALUE SUBJECT TO SCHOOL TAX	0
	SCHOOL RATE PER $100	00.000
B -	SCHOOL TAX	.00
	TOTAL TAX EQUALS A + B	.00
	QUARTERLY AMOUNT DUE	.00

* DETAILS OF EXEMPT VALUE
EXMT STATE LANDS & BLDGS - 1,500

TOTAL DISCOUNT IF PAID ON OR BEFORE JULY 1, 1992 .00

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THE CITY OF NEW YORK
DEPARTMENT OF FINANCE

BOROUGH OF MANHATTAN
TAX YEAR 1992 - 1993

OWNER OF RECORD	ADDRESS OF PROPERTY
NATL RR PASSNGER CORP	IDENT. NO. 2303

18230300111

IDENT. NO. 2303
NATL RR PASSNGER CORP
400 N CAPITOL ST NW
WASHINGTON DC 20001

BLOCK	LOT	C
82303	11	6

CHECK BLOCK AND LOT NUMBER.

41

PROPERTY TYPE/CODE FULLY EXEMPT PROPERTIES PRIVAT /X

NOTIFY THE BOROUGH PROPERTY ASSESSMENT OFFICE IF THE OWNER OF RECORD OR DESCRIPTION OF PROPERTY ABOVE IS INCORRECT OR MISSING. SEE REVERSE SIDE FOR ADDRESSES

DETAIL OF BILL

	ASSESSED VALUE	6,300
	EXEMPT VALUE	6,300*
	TAXABLE VALUE	0
	REAL ESTATE RATE PER $100	10.698**
A -	REAL ESTATE TAX	.00
	ASSESSED VALUE SUBJECT TO SCHOOL TAX	0
	SCHOOL RATE PER $100	00.000
B -	SCHOOL TAX	.00
	TOTAL TAX EQUALS A + B	.00
	QUARTERLY AMOUNT DUE	.00

* DETAILS OF EXEMPT VALUE
EXMT STATE LANDS & BLDGS - 6,300

TOTAL DISCOUNT IF PAID ON OR BEFORE JULY 1, 1992 .00

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BOROUGH OF MANHATTAN
TAX YEAR 1992 - 1993

OWNER OF RECORD	ADDRESS OF PROPERTY
NATL. RR PASSENGER CORP	IDENT NO.2308

18230800111

IDENT NO.2308
NATL. RR PASSENGER CORP
400 N CAPITOL ST NW
WASHINGTON DC 20001

BLOCK	LOT	C
82308	11	5

CHECK BLOCK AND LOT NUMBER

304

PROPERTY TYPE/CODE FULLY EXEMPT PROPERTIES PRIVAT /X

NOTIFY THE BOROUGH PROPERTY ASSESSMENT OFFICE IF THE OWNER OF RECORD OR DESCRIPTION OF PROPERTY ABOVE IS INCORRECT OR MISSING. SEE REVERSE SIDE FOR ADDRESSES

DETAIL OF BILL

	ASSESSED VALUE	290,000
	EXEMPT VALUE	290,000*
	TAXABLE VALUE	0
	REAL ESTATE RATE PER $100	10.698**
A -	REAL ESTATE TAX	.00
	ASSESSED VALUE SUBJECT TO SCHOOL TAX	0
	SCHOOL RATE PER $100	00.000
B -	SCHOOL TAX	.00
	TOTAL TAX EQUALS A + B	.00
	SEMI-ANNUAL AMOUNT DUE	.00
*	DETAILS OF EXEMPT VALUE	
	EXMT STATE LANDS & BLDGS -	290,000

TOTAL DISCOUNT IF PAID ON OR BEFORE JULY 1, 1992 .00

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DEPARTMENT OF FINANCE

BOROUGH OF MANHATTAN
TAX YEAR 1992 - 1993

OWNER OF RECORD	ADDRESS OF PROPERTY
NATL. RR PASSENGER CORP	IDENT. NO. 2205

182205001111

IDENT. NO. 2205
NATL. RR PASSENGER CORP
400 N CAPITOL ST NW
WASHINGTON DC 20001

BLOCK	LOT	C
82205	11	3

CHECK BLOCK AND LOT NUMBER

295

PROPERTY TYPE/CODE FULLY EXEMPT PROPERTIES PRIVAT /X

NOTIFY THE BOROUGH PROPERTY ASSESSMENT OFFICE IF THE OWNER OF RECORD OR DESCRIPTION OF PROPERTY ABOVE IS INCORRECT OR MISSING. SEE REVERSE SIDE FOR ADDRESSES

DETAIL OF BILL

	ASSESSED VALUE	52,533,800
	EXEMPT VALUE	52,533,800*
	TAXABLE VALUE	0
	REAL ESTATE RATE PER $100	10.698**
A -	REAL ESTATE TAX	.00
	ASSESSED VALUE SUBJECT TO SCHOOL TAX	0
	SCHOOL RATE PER $100	00.000
B -	SCHOOL TAX	.00
	TOTAL TAX EQUALS A + B	.00
	SEMI-ANNUAL AMOUNT DUE	.00

* DETAILS OF EXEMPT VALUE
EXMT FED SUBSIDIZED RR - 52,533,800

TOTAL DISCOUNT IF PAID ON OR BEFORE JULY 1, 1992 .00

**.175 OF WHICH PUTS MORE POLICE ON OUR STREETS

REAL PROPERTY TAX LAW PROVIDES THAT TAXES ARE TO BE BASED ON THE LOWER OF THE TRANSITION OR ACTUAL ASSESSED VALUE

FOR ADDITIONAL INFORMATION SEE REVERSE SIDE

PAYMENT PERIODS

YOUR PAYMENTS ARE DUE IN 2 INSTALLMENTS ON JULY 1, 1992, JANUARY 1, 1993

INTEREST

If payment on installment is not made by the due date or the end of the grace period (if any), interest will be charged at the rate of 9% per annum compounded daily from the original due date of the installment.

DISCOUNTS

Except for the first installment, a 2.00% discount per annum will be allowed for early payment of installments. See reverse side for details.

PROTESTS

The period for protesting assessed valuation for 1993/94
1, 2, & 3 family dwellings: JANUARY 15, 1993 TO MARCH 15, 1993
All others: JANUARY 15, 1993 TO MARCH 1, 1993

OTHER INFORMATION

Estimated local assistance from New York State during 1992/93 - $6,189,617,607

DO NOT MAIL CASH!

Make check or money order payable to NYC DEPT. OF FINANCE. Please write borough, block, and lot no. on check. Your cancelled check is your receipt. **Statements of account will be mailed twice a year.** A $15.00 service charge will be assessed for each dishonored check. Cash payments may be made at any borough office of the City Collector, Mon. - Fri. 9am to 3pm.

RETAIN THIS PORTION FOR YOUR RECORDS

R192 C7

FOR FULL YEAR PAYMENT USE THIS COUPON

FINANCE NEW·YORK
THE CITY OF NEW YORK
DEPARTMENT OF FINANCE

BOROUGH OF MANHATTAN
TAX YEAR 1992 - 1993

OWNER OF RECORD	ADDRESS OF PROPERTY
NATL. RR PASSENGER CORP	IDENT. NO. A2205

1822050111 1

IDENT. NO. A2205
NATL. RR PASSENGER CORP
400 N CAPITOL ST NW
WASHINGTON DC 20001

BLOCK	LOT	C
82205	111	1

CHECK BLOCK AND LOT NUMBER

296

PROPERTY TYPE/CODE FULLY EXEMPT PROPERTIES PRIVAT /X

NOTIFY THE BOROUGH PROPERTY ASSESSMENT OFFICE IF THE OWNER OF RECORD OR DESCRIPTION OF PROPERTY ABOVE IS INCORRECT OR MISSING SEE REVERSE SIDE FOR ADDRESSES

DETAIL OF BILL

	ASSESSED VALUE	112,610,917
	EXEMPT VALUE	112,610,917*
	TAXABLE VALUE	0
	REAL ESTATE RATE PER $100	10.698**
A -	REAL ESTATE TAX	.00
	ASSESSED VALUE SUBJECT TO SCHOOL TAX	0
	SCHOOL RATE PER $100	00.000
B -	SCHOOL TAX	.00
	TOTAL TAX EQUALS A + B	.00
	SEMI-ANNUAL AMOUNT DUE	.00
*	DETAILS OF EXEMPT VALUE	
	EXMT FED SUBSIDIZED RR	112,610,917

TOTAL DISCOUNT IF PAID ON OR BEFORE JULY 1, 1992 .00

**.175 OF WHICH PUTS MORE POLICE ON OUR STREETS

REAL PROPERTY TAX LAW PROVIDES THAT TAXES ARE TO BE BASED ON THE LOWER OF THE TRANSITION OR ACTUAL ASSESSED VALUE

FOR ADDITIONAL INFORMATION SEE REVERSE SIDE

PAYMENT PERIODS

YOUR PAYMENTS ARE DUE IN 2 INSTALLMENTS ON JULY 1, 1992, JANUARY 1, 1993

INTEREST

If payment on installment is not made by the due date or the end of the grace period (if any), interest will be charged at the rate of 9% per annum compounded daily from the original due date of the installment.

DISCOUNTS

Except for the first installment, a 2.00% discount per annum will be allowed for early payment of installments. See reverse side for details.

PROTESTS

The period for protesting assessed valuation for 1993/94
1, 2, & 3 family dwellings: JANUARY 15, 1993 TO MARCH 15, 1993
All others: JANUARY 15, 1993 TO MARCH 1, 1993

OTHER INFORMATION

Estimated local assistance from New York State during 1992/93 - $6,189,617,607

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Make check or money order payable to NYC DEPT. OF FINANCE. Please write borough, block, and lot no. on check. Your canceled check is your receipt. Statements of account will be mailed twice a year. A $15.00 service charge will be assessed for each dishonored check. Cash payments may be made at any borough office of the City Collector, Mon. - Fri. 9am to 3pm.

RETAIN THIS PORTION FOR YOUR RECORDS

R182 C7

FOR FULL YEAR PAYMENT USE THIS COUPON

PLAINTIFF'S EXHIBIT 58

NATIONAL RAILROAD PASSENGER CORPORATION
MINUTES OF THE MEETING OF
THE BOARD OF DIRECTORS'
REAL ESTATE SUBCOMMITTEE
September 22, 1987

The Real Estate Subcommittee of the Board of Directors of the National Railroad Passenger Corporation met on Tuesday, September 22, 1987 at the offices of the Corporation, 400 North Capitol Street, N.W., Washington, D.C. beginning at 1:05 p.m.

Committee members W. Graham Claytor, Jr.; Samuel H. Hellenbrand; William J. Watt, representing Governor Robert D. Orr; and James T. McQueen, representing the Secretary of Transportation attended the meeting.

Board members Darrell M. Trent and Paul M. Weyrich attended the meeting.

Tony DeAngelo, Charles W. Hayward, John P. Lange, Henry R. Moore, William S. Norman, Dennis F. Sullivan, and Elyse G. Wander of the Corporation's executive staff were present.

Bruce M. Bou-que, William F. Erkelenz, Daniel Hertz, Edward M. Jenkins, Richard I. Klein, Robert Z. LaCroix, John C. McCaffrey, Paul H. Menk, and Jonathan S. Wyner of the Corporation's staff also attended the meeting.

Mr. Hellenbrand served as Chairman; Mrs. Oliveri acted as Secretary.

Resolutions Authorizing the Lease of Retail Space in Pennsylvania Station, New York to Fotomat Corporation; Cotner Investment Corporation; Penn Han Madang, Inc; Control Data Corporation; Gourmet Management, Inc.; A Terminal Operating, Inc.; and A&S Department Stores, Inc.

The Chairman called the Committee's attention to resolutions authorizing the lease of retail space in Pennsylvania Station, New York of Fotomat Corporation; Cotner

Investment Corporation; Penn Han Madang, Inc.; Control Data Corporation; Gourmet Management, Inc.; and A Terminal Operating, Inc. He also directed the Committee's attention to a resolution authorizing the lease of the advertising spectacular sign location in Pennsylvania Station to A&S Department Stores, Inc. He reviewed the terms and conditions of the leases. Following discussion, upon motion duly made and seconded, the Committee voted to recommend Board approval of the following resolutions:

A&S Department Stores, Inc.

WHEREAS, Nike Corporation leased the 1,000 square foot "Advertising Spectacular" sign location above the former ticket counter on the B Level of Pennsylvania Station, New York, which lease expired in March 1987, and

WHEREAS, representatives of the Corporation and A&S Department Stores, Inc. have reached agreement in principle to lease that advertising sign location for a term of one and one-half years, commencing October 1987, which term may be extended for a future term of one year subject to Amtrak's consent, and

WHEREAS, the Corporation will receive a significant increase in rental, be it

RESOLVED, that the Corporation is authorized to enter into a lease with A&S Department Stores, Inc. consistent with the foregoing.

Board member Frank W. Jenkins and Timothy P. Gardner and Elyse G. Wander of the Corporation's executive staff joined the meeting during the discussion. George Meredith of the Corporation's staff also joined the meeting. Mr. Sullivan left the meeting.

PLAINTIFF'S EXHIBIT 59

NATIONAL RAILROAD PASSENGER CORPORATION
MINUTES OF THE MEETING OF
THE BOARD OF DIRECTORS'
FINANCE COMMITTEE
September 22, 1987

The Finance Committee of the National Railroad Passenger Corporation met on Tuesday, September 22, 1987 at the offices of the Corporation, 400 North Capitol Street, N.W. in Washington, D.C. beginning at 1:35 p.m.

Committee members W. Graham Claytor, Jr.; Samuel H. Hellenbrand; James T. McQueen, representing the Secretary of Transportation; William J. Watt, representing Governor Robert D. Orr; and Paul M. Weyrich attended the meeting.

Board members Ralph T. Kerchum and Darrell M. Trent were present.

Tony DeAngelo, Timothy P. Gardner, Charles W. Hayward, Henry R. Moore, William S. Norman, Dennis F. Sullivan, and Elyse G. Wander of the Corporation's executive staff were present.

William F. Erkelenz, Daniel Hertz, Richard I. Klein, Robert Z. LaCroix, and John McCaffrey of the Corporation's staff also attended the meeting.

Mr. Hellenbrand presided as Chairman; Mrs. Oliveri served as Secretary.

Resolutions Authorizing the Leasing of Retail Space and the Advertising Spectacular Sign Location in Pennsylvania Station, New York; the Sale of Land in Elizabeth, New Jersey; New Brunswick, New Jersey; and Providence, Rhode Island; the Sale of the Readville Yard in Boston/Dedham, Massachusetts; and Settlement of a Condemnation of Amtrak's Interest in Land in New Brunswick, New Jersey

The Chairman directed the Committee's attention to resolutions which had been reviewed by the Real Estate Subcommittee and recommended their approval. Upon motion

duly made and seconded, the Committee voted to recommend Board approval of the following resolutions:

- Resolution Authorizing the Lease of the Advertising Spectacular Sign Location in Pennsylvania Station, New York to A&S Department Stores, Inc.;

(These resolutions are contained in the September 22, 1987 minutes of the Real Estate Subcommittee.)

PLAINTIFF'S EXHIBIT 60

NATIONAL RAILROAD PASSENGER CORPORATION
MINUTES OF THE MEETING OF
THE BOARD OF DIRECTORS
September 23, 1987

The Board of Directors of the National Railroad Passenger Corporation held its regular meeting at the offices of the Corporation on Wednesday, September 23, 1987, beginning at 9:30 a.m.

Board members W. Graham Claytor, Jr.; Samuel H. Hellenbrand; Frank W. Jenkins; Ralph T. Kerchum; Charles Luna; Governor Robert D. Orr; John Riley; Darrell M. Trent; and Paul M. Weyrich were present.

James T. McQueen of the Federal Railroad Administration and William J. Watt, alternate for Governor Orr, attended the meeting.

Harold R. Henderson, Charles W. Hayward, Henry R. Moore, and William S. Norman of the Corporation's executive staff were present.

William F. Erkelenz, Corporate Secretary, also attended the meeting.

Mr. Claytor presided as Chairman; Mrs. Oliveri acted as Secretary.

Resolution Authorizing the Lease of the Advertising Spectacular Sign Location in Pennsylvania Station, New York to A&S Department Stores, Inc.

Mr. Hellenbrand directed the Board's attention to a resolution authorizing the lease of the advertising spectacular sign location in Pennsylvania Station, New York to A&S Department Stores, Inc. He advised the Board of the financial terms of the lease. Following discussion, upon motion duly made and seconded, the Board voted to approve the following resolution:

> WHEREAS, Nike Corporation leased the 1,000 square foot "Advertising Spectacular" sign location above the

former ticket counter on the B Level of Pennsylvania Station, New York, which lease expired in March 1987, and

WHEREAS, representatives of the Corporation and A&S Department Stores, Inc. have reached agreement in principle to lease that advertising sign location for a term of one and one-half years, commencing October 1987, which term may be extended for a further term of one year subject to Amtrak's consent, and

WHEREAS, the Corporation will receive a significant increase in rental, be it

RESOLVED, that the Corporation is authorized to enter into a lease with A&S Department Stores, Inc. consistent with the foregoing.

PLAINTIFF'S EXHIBIT 61

NATIONAL RAILROAD PASSENGER CORPORATION

1992 ANNUAL REPORT

Five-Year Comparison of Amtrak's Performance

	1992	1991	1990	1989	1988
Revenues (millions)	**$1,324.8**	$1,359.0	$1,308.4	$1,269.1	$1,106.7
Expenses (millions)	**$2,036.6**	$2,080.5	$2,011.8	$1,934.5	$1,757.1
Revenue-to-Expense Ratio*	**.79**	.79	.72	.72	.69
Revenue-to-Short-Term Avoidable Cost Ratio**	**1.19**	1.23	1.20	1.20	1.15
Revenue-to-Long-Term Avoidable Cost Ratio***	**.95**	.96	.93	.91	.90
Passenger Miles (millions)****	**6,091**	6,273	6,057	5,859	5,678
Passenger Miles per Train-Mile****	**176.8**	184.5	183.3	188.4	188.3
System On-Time Performance	**77%**	77%	76%	75%	71%
Ridership (millions)					
Amtrak System	**21.3**	22.0	22.2	21.4	21.5
Contract Commuter	**20.3**	18.1	18.0	17.4	15.4
Total	**41.6**	40.1	40.2	38.8	36.9

* Beginning in fiscal year 1991, the methodology of computing this ratio was changed to reflect the exclusion of excess Railroad Retirement and Unemployment Insurance Taxes which are now paid directly to the Internal Revenue Service by the Federal Railroad Administration on behalf of Amtrak.

** Short-term avoidable costs—Costs of activities that would stop with the discontinuance of a route or train, or begin with the introduction of a new route or train. Such costs include train and engine crews, fuel and power, and maintenance of way.

*** Long-term avoidable costs—All short-term avoidable costs, plus claims expenses, heavy maintenance, and a portion of corporate and field overhead.

**** Contract commuter passengers not included.

* * *

President's Report

The past year posed some of the toughest challenges Amtrak has faced in its 21 years as the nation's intercity rail passenger carrier. The national economy steadfastly refused to budge from its doldrums and the adverse impact on the travel sector has been far-reaching Discretionary travel—on which Amtrack depends for most of its revenues—fell sharply, hurting all carriers alike. Business travel similarly declined. The response by the airline industry—an aggressive fare war—resulted in the lowest airline yields (dollars per passenger mile) in many years and further undermined ridership on competing modes, including Amtrak.

For the first time in over a decade, Amtrak revenues and passenger miles declined—2.5 percent and 2.9 percent, respectively. This forced Amtrak to continue and expand a series of corporate-wide actions to reduce its operating budget—actions which have worked against our ability to provide the highest quality service. Management salaries were frozen, station and on-board staffing reduced, and some rail service eliminated. Fortunately, these steps were sufficient to avoid massive seasonal furloughs, although reduction in equipment overhauls at our Beech Grove (Ind.) Maintenance Facility resulted in some furloughs after the end of FY 1992. In fact, costs company-wide were reduced sufficiently to maintain the railroad's revenue-to-cost ratio at .79. This is the highest ratio in our history and one of the best (if not the best) among passenger railroads in the world. Nonetheless, the year fell well below our financial expectations and was a very difficult one for all of Amtrak's 24,000 employees.

* * *

Nonetheless, it is important to recognize that there remains a growing gap between the amount of new passenger equipment we need to boost revenues and efficiency, and the amount of capital funds that are available to order cars and locomotives. Without new equipment and plant modernization, Amtrak will not be able to provide quality service or improve revenues sufficiently to continue reducing its oper-

ating subsidy. We are attacking this issue from a number of fronts: encouraging states to invest in rail passenger infrastruture; seeking higher federal capital investment; and making the case for establishment of a trust fund to support investment in Amtrak and high-speed rail. Clearly, this issue must be addressed if Amtrak is to move forward with its primary corporate goal of improving the quality of service while covering more and more of its own operating costs.

That Amtrak did not meet its financial goals for 1992 should not overshadow the many significant accomplishments that were achieved this year. Chief among them were the decisions by transit agencies in both the Los Angeles and San Francisco metropolitan areas to contract with Amtrak to operate their commuter rail service. Indeed, for the first time in its history, Amtrak is now carrying more commuter passengers than intercity travelers. The new contracts, together with the start-up of the Amtrak-operated Virginia Railway Express, further demonstrate the confidence rail planners have in Amtrak's ability to provide high quality, reliable commuter service. We are extremely proud of our growing role as a commuter carrier and believe its importance to the corporation's future cannot be overestimated.

* * *

Two factors brighten our outlook for the future: an improving national economy, and near-unanimous recognition that greater federal investment in the nation's transportation infrastructure is badly needed to address our economic, environmental and transportation needs. As a result, the next several years can be strong ones for Amtrak if the commitment is made to adequately invest in Amtrak's future and to fully develop Amtrak's potential as an energy-efficient and environmentally superior alternative to growing highway and airport congestion. I believe the American people are ready to support that investment, and as a company, we are anxious to demonstrate to the nation just how beneficial an investment in rail passenger service can be.

W. Graham Clayton, Jr.
President

Providing A Unique Service

* * *

Stations: The Threshold Between Past and Future

When Amtrak was created in 1971 to preserve a national rail passenger system, it inherited an inventory of outmoded and dilapidated passenger stations. In the past two decades, Amtrak, states and local communities have begun to replace or rebuild these relics to reflect some of the grandeur and importance for which the local train station once stood. The job is hardly complete, but an increasing number of Amtrak stations now provide the passenger with a unique and positive view both of the train and of the communities through which Amtrak travels.

* * *

Despite the difficult national economy, Amtrak and many of the communities it serves continued to restore and improve passenger stations:

— Chicago Union Station celebrated the complete rebuilding and renovation of the passenger station facilities. The $32 million project, funded jointly by Amtrak and Metra, the commuter rail agency, has transformed the station from a maze of pedestrian bottlenecks to a smooth-flowing, passenger-friendly facility. Behind the scenes are modern mechanical, plumbing and heating and cooling systems, as well as employee locker rooms, commissary and other renovated facilities.

— A $438,000 project was completed at the historic Warrensburg, Mo., station. Originally constructed in 1890, the improvements—including new mechanical systems, parking and platforms—were jointly funded by the community, a local charity, the state and Amtrak.

— The City of Fostoria, Ohio, funded the improvement of portions of the Fostoria station now used for Amtrak service to Chicago and New York. Service to Fostoria was initiated with the rerouting of the *Capitol* and *Broadway Limiteds* in 1991, and improvements were required to provide for Amtrak ticketing and passenger seating.

* * *

— Renovations to the Hudson, N.Y., station were completed in August, providing for new parking, platforms and a beautiful station interior at one of Amtrak's busiest stations. Ninety-five percent of the $1.5 million cost of renovations was provided by the state.

* * *

Getting the Train to the People . . .

In December 1991, Amtrak inaugurated the new state-supported *Capitols* service between Sacramento and San Jose. With three daily round trips, one of which originates in Roseville, the new service has been a resounding success and epitomizes the commitment California has made to rail transportation. Indeed, fares generated on the Capitals already exceed the short-term cost of operating the trains, a remarkable achievement for a service that is less than one year old. California, which shares in funding the train with Amtrak, also provided the locomotives required for the service. With additional state-funded capital improvements in stations and upgraded tracks, the *Capitols* are expected to become one of Amtrak's most important corridor services.

* * *

. . . and the People to the Train

In addition to serving the new markets, Amtrak is improving access to the trains and facilities for all passengers, including those with mobility impairments and other disabilities. Driven by the time-frame established under the Americans with Disabilities Act (ADA), Amtrak plans to make improvements to most of its 524 stations to provide full access to station services—including restrooms and ticketing—and to its trains.

— In July, Amtrak completed a plan for making key commuter stations owned by Amtrak accessible. Improvements will be made to these stations over the next year, and the remaining stations over the following years.

— New passenger equipment ordered by Amtrak, including Superliners and Viewliners, will incorporate significant changes to improve mobility, restrooms, lighting and signs.

— Amtrak is developing a new generation of lifts to be located directly in the vestibules of its passenger cars. Funded under a grant from the U.S. Department of Education, the new devices could eliminate the need to provide expensive portable lifts at every Amtrak station. Testing of the prototype lifts is expected to begin next year to determine their ability to withstand the rigors of the railway environment.

— Amtrak has established a Consumer Advisory Board, consisting of members of several major associations representing individuals with disabilities, to provide consumer input on the design and testing of the lift program and on other accessibility issues.

* * *

Preparing for Future Markets

* * *

Amtrak's investment in in equipment and Northeast Corridor infrastructure improvements is only part of the investment that is needed to realize the potential of rail passenger service in the 21st century. There is continuing interest in additional Amtrak service on some routes and new Amtrak service where none exists today. At the same time, there is a growing public mandate for high-speed rail in densely populated corridors where air and highway congestion are seriously impairing the quality of life. Significant expansion of Amtrak service, whether conventional or high-speed, will depend on a commitment by all levels of government to rail improvements as a necessary and important component of transportation infrastructure planning and investment.

Overview of Financial Performance

The financial statements, together with the report of the Auditor, provide the hard data regarding Amtrak's financial status as of the close of the year. It is important to understand these statements as well as what lies behind the numbers.

Revenues: For the first time since 1975, revenues actually declined $34.2 million compared to the record performance of 1991. This should not obscure the fact that Amtrak generated $1.3 billion in passenger and other revenues. Nonetheless, revenues were below even our modest expectations for the year.

— **Passenger Revenues:** Revenue generated from ticket sales fell 3.5 percent, clearly reflecting the continued poor national economy and sluggishness in the travel sector. Furthermore, Hurricane Andrew, the 1992 airline fare wars, and the freight rail strike also undermined ticket sales at critical times during the year. On-board dining and buffet revenues similarly fell 5.5 percent.

— **Real Estate and Operations Development:** The 1992 performance was 11.5 percent below the previous year due to several factors, including the closing of a cogeneration plant in New Haven, weak rental and leasing revenues which resulted from the poor national economy, and severe overbuilding during the 1980s.

— **Commuter Operations:** Fortunately, there were also some positive areas for revenue generation. The most important was commuter operating revenues generated from Amtrak's growing contract commuter operations. With the addition of new California and Virginia commuter services, revenues rose by 16.7 percent.

— **State 403(b) Support:** The initiation of several new 403(b) state supported services last year—the *Capitols* in California and an additional Chicago-Milwaukee *Hiawatha Service* Train—resulted in a 26.3 percent increase in state payments to Amtrak.

Revenue Comparison
FY 1986–FY 1992
(in millions of dollars)

* * *

Overview of Financial Performance

Expenses: Amtrak's greatest achievement during the past year may well have been its ability to reduce corporate

expenses in the face of disappointing revenue generation: Expenses declined $44 million from last year—a decrease of 2.1 percent—despite inflation and the costs associated with the operation of several new services.

— Some of this decline relative to 1991 was the result of a special charge of $27.2 million taken in FY 1991, and is discussed in the footnotes to the financial statements.

— Cost cutting efforts—which included a management salary freeze, decreased staffing of trains and stations, and some productivity improvements resulting from the new labor agreements—were sufficient to offset much of the decline in revenues and permit the Corporation to actually improve its bottom line revenue-to-cost ratio despite the recession. In FY 1991 the ratio was .785; this year the ratio improved to .791.

* * *

Consolidated Statements of Operations

	For the Years Ended September 30, 1992	1991
	(Thousands of dollars)	
Revenues:		
Transportation related	**$1,195,568**	$1,208,682
Other	**129,228**	150,268
Total Revenues	**1,324,796**	1,358,950
Expenses:		
Train operations	**462,050**	449,485
Maintenance of equipment	**440,924**	443,481
Maintenance of way	**203,022**	204,511
On-board services	**171,224**	169,733
Stations	**134,690**	125,464
Marketing and reservations	**177,177**	184,457
General support	**112,216**	147,293
Taxes and insurance	**61,943**	63,368
Depreciation and amortization	**205,800**	202,643
General and administrative	**49,672**	49,531
Special charges	-	27,165
Interest	**17,858**	13,307
Total expenses	**2,036,576**	2,080,538
Net Loss	**$ 711,780**	$ 721,588

Consolidated Statements of Cash Flows

	For the Years Ended September 30, 1992	1991
	(Thousands of dollars)	
Cash Flows From Operating Activities:		
Net loss	**$(711,780)**	$(721,588)
Adjustments to reconcile net loss to net cash used in operating activities:		
Depreciation and amortization	**205,800**	202,643
Provision for inventory loss and obsolescence	**5,200**	9,000
Provision for losses on accounts receivable	**6,000**	3,300
Retirement and unemployment taxes paid by Federal Railroad Administration	**150,200**	144,798
Other	**6,659**	7,169
Changes in assets and liabilities:		
Decrease in accounts receivable	**8,356**	1,072
Increase in materials and supplies	**(2,183)**	(18,314)
Decrease in other current assets	**5,611**	2,985
Decrease in other assets and deferred charges	**2,225**	3,695
Decrease in accounts payable, deferred ticket revenue, and accrued expenses and other current liabilities	**(30,249)**	(11,226)
Decrease in other liabilities and deferred credits	**(24,927)**	(9,455)
Net cash used in operating activities	**(379,088)**	(385,921)
Cash Flows From Investing Activities:		
Purchases and refurbishments of property and equipment	**(343,392)**	(306,371)
Proceeds from disposals of property and equipment	**1,175**	904
Cash released from restricted proceeds of tax benefit sales	**26,887**	15,449
Cash from Union Station Redevelopment Corporation	**1,851**	2,137
Cash released from (designated for) Penn Station joint venture	**10,306**	(2,440)
Cash restricted for capital spending	**(47,274)**	—
Cash investments	**(2,958)**	(25,467)

For the Years Ended September 30,	1992	1991
	(Thousands of dollars)	
Proceeds from dispositions of cash investments	**6,122**	53,009
Other	**414**	—
Net cash used in investing activities	**(346,869)**	(262,779)
Cash Flows From Financing Activities:		
Proceeds from issuance of preferred stock	**504,300**	529,375
Proceeds from federal paid-in capital	**180,814**	35,891
Proceeds from federal and state capital payments	**24,358**	21,756
Proceeds from debt	**31,530**	23,000
Repayments of debt and capital lease obligations	**(10,344)**	(7,287)
Net cash provided by financing activities	**730,658**	602,735
Net increase (decrease) in cash and cash equivalents	**4,701**	(45,965)
Cash and cash equivalents—beginning of year	**30,937**	76,906
Cash and cash equivalents—end of year	**$ 35,638**	$ 30,937

The accompanying notes are an integral part of these consolidated statements.

Consolidated Statements of Changes in Capitalization

	Preferred stock	Common stock	Other paid-in capital	Accumulated deficit	Totals
	(Thousands of dollars)				
Balance at September 30, 1990	$ 6,616,414	$ 93,857	$ 3,750,187	$ (7,197,811)	$3,262,647
Issuance of preferred stock	529,375	—	—	—	529,375
Federal paid-in capital	—	—	180,689	—	180,689
Federal and state capital payments	—	—	22,445	—	22,445
Net loss	—	—	—	(721,588)	(721,588)
Balance at September 30, 1991	7,145,789	93,857	3,953,321	(7,919,399)	3,273,568
Issuance of preferred stock	504,300	—	—	—	504,300
Federal paid-in capital	—	—	331,014	—	331,014
Federal and state capital payments	—	—	—	21,605	21,605
Net loss	—	—	—	(711,780)	(711,780)
Balance at September 30, 1992	**$7,650,089**	**$93,857**	**$4,305,940**	**$(8,631,179)**	**$3,418,707**

The accompanying notes are an integral part of these consolidated statements.

Notes to Consolidated Financial Statements For the Years Ended September 30, 1992 and 1991

NOTE 1: SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

Principles of Consolidation

The financial statements reflect the consolidated operations of the National Railroad Passenger Corporation, its wholly-owned subsidiaries Chicago Union Station Company (CUS) and Washington Terminal Company, and its 99% interest in 30th Street Limited, L.P. (TSL), beginning in 1992 (see Note 9). All significant intercompany transactions have been eliminated.

Passenger Revenue

Passenger fares are recognized as operating revenues when the related transportation services are furnished. Tickets which have been sold but not used are presented as "Deferred ticket revenue" in the Consolidated Balance Sheets.

Contracted Services

The Consolidated Statements of Operations include the gross revenues earned and expenses incurred under arrangements to operate various commuter rail services, to provide access to the Northeast Corridor and other Amtrak owned facilities, and to perform services for freight railroads.

Cash Equivalents and Short-Term Cash Investments

Amtrak considers all financial instruments purchased having a maturity of three months or less than to be cash equivalents. Those financial instruments purchased with a maturity of over three months, and which mature not more than one year from the Consolidated Balance Sheet date, are classified as short-term cash investments.

Materials and Supplies

Materials and supplies, which are stated at average cost, consist primarily of items for maintenance and improvement of property and equipment.

Property and Depreciation

Property and equipment are stated at cost, and are depreciated using the composite straight-line method over their estimated useful lives. Certain major items of property acquired through capital lease agreements are recorded as assets and are amortized over the shorter of their estimated useful lives of the lease term.

Casualty Losses

Provision is made for Amtrak's portion of the estimated liability for unsettled casualty and accident claims. The current portion of this liability is included in the Consolidated Balance Sheets under "Accrued expenses and other current liabilities." The non-current portion is classified as "Casualty reserves." As of September 30, 1992 and 1991, the current claims liability included in accrued expenses and other current liabilities was $53,100,000 and $51,100,000, respectively.

NOTE 2: FEDERAL AND STATE FUNDING

Funds are provided to Amtrak through federal and state payments for operations and for capital acquisitions and improvements. For funds received from the federal government, Section 304 of the Rail Passenger Service Act (45 U.S.C. 544) requires Amtrak to issue to the United States Secretary of Transportation preferred stock equal in par value to all federal operating payments and most federal capital payments received subsequent to October 1, 1981, as well as capital and certain operating payments received prior to that date. Public Law 102-388, approved on October 6, 1992, provides $700,100,000 in federal funds to Amtrak for fiscal year

1993, of which $331,000,000 is for operating purposes, and the balance for capital acquisitions and improvements.

Federal paid-in capital, included in the Consolidated Statements of Changes in Capitalization, includes certain funding received from the federal government to finance acquisition of and improvements to property and equipment in exchange for past and prospective funding. Amtrak issued two promissory notes to the United States. The first note matures on November 1, 2082, with successive 99-year renewal terms, and is secured by certain Amtrak rolling stock. The second note matures on December 31, 2975, and is secured by Amtrak's real property. Neither of the notes bears interest, unless prepaid (which Amtrak does not intend to do). The federal government's security interest in Amtrak's real property and certain rolling stock entitles it to repayment plus interest in the event Amtrak ceases operations, is acquired by another entity, or seeks relief under bankruptcy or insolvency laws. –

Federal paid-in capital also includes payments made on Amtrak's behalf by the Federal Railroad Administration (FRA). During the year ended September 30, 1992, the FRA deposited $150,200,000 with the Internal Revenue Service in payment of Amtrak's excess Railroad Retirement Tax Act tax liabilities, excess Railroad Unemployment Repayment Tax payments, and excess Railroad Unemployment Insurance Act payments.

NOTE 3: PREFERRED AND COMMON STOCK

At September 30, 1992, 78,160,000 shares of $100 par value preferred stock were authorized, of which 76,500,895 shares were issued and outstanding. On October 29, 1992, 1,038,200 shares of preferred stock were issued at par value, increasing the total number of shares issued and outstanding to 77,539,095. At September 30, 1991, 73,100,000 shares were authorized, of which 71,457,895 shares were issued and outstanding. All issued and outstanding preferred shares are

held by the Secretary of Transportation for the benefit of the federal government. Dividends are to be fixed at a rate not less than 6% per annum, and are cumulative so that no dividends may be paid on the common shares prior to the payment of all accrued but unpaid dividends on the preferred shares. No dividends have been declared. The preferred stockholder is also entitled to a liquidation preference over common shares involving a payment of not less than par value plus all accrued and unpaid dividends. Each share of preferred stock is convertible into 10 shares of common stock at the option of the preferred stockholder.

At September 30, 1992 and 1991, 10,000,000 shares of $10 par value common stock were authorized, of which 9,385,694 shares were issued and outstanding.

NOTE 4: BORROWING ARRANGEMENTS

Long term debt presented in the Consolidated Balance Sheets consisted of the following (in thousands):

	1992	1991
Equipment obligations	$ 87,658	$ 88,487
Lines of Credit	22,500	19,000
Bonds	30,000	—
Construction loan	26,225	—
UDAG	12,220	—
	$178,603	$107,487

Amtrak has entered into an agreement with a manufacturer for the construction of 140 passenger cars at a total estimated price of $400,000,000. Under the terms of a loan agreement with a third-party lender, Amtrak may borrow up to $340,000,000 in the form of advances made by the lender to the manufacturer towards the cars' construction. Interests on amounts advanced is being charged to Amtrak during construction and is payable quarterly. Principal repayments of all outstanding advances are due in 80 consecutive quarterly

installments commencing the earlier of when the last car is delivered or June 30, 1996. All amounts borrowed by Amtrak are secured by the finished passenger cars. Interest and related financing charges incurred by Amtrak are being capitalized during the construction period as a component of the cars' total cost. Interest capitalized during the years ended September 30, 1992 and 1991 totaled $8,234,000 and $3,641,100, respectively.

Amtrak has conditionally purchased 15 locomotives. The financed portion of each locomotive's purchase price plus accrued interest are due two years following the date of delivery and acceptance. Amtrak has the option at the end of this period to return any locomotive in lieu of paying the principal and accrued interest due. At September 30, 1992, no locomotives have been returned, and the related debt is secured by the locomotives.

Amtrak and CUS have $95,000,000 of unsecured lines of credit with banks expiring from December 1992 to March 1993, which are subject to certain conditions. Borrowings under these agreements bear interest based on the London Interbank Offered Rate (LIBOR), Eurodollar rate, certificate of deposit rates, prime rate, or rate offered by the lender. Amtrak pays various fees on its credit lines. At September 30, 1992, Amtrak and CUS had borrowed $52,000,000 under these agreements. $20,000,000 of these borrowings were repaid in October 1992.

Included in TSL's long-term debt at September 30, 1992 are $30,000,000 of Philadelphia Authority for Industrial Development tax-exempt private-activity bonds (Bonds) issued for the benefit of TSL's rehabilitation of 30th Street Station (Station) in the city of Philadelphia, Pennsylvania (City). The Bonds were issued on December 30, 1987, mature on January 1, 2011, and bear interest at a fixed or variable rate as stipulated in the bond indenture. Interest is payable until maturity at intervals determined under provisions in the bond indenture. No amortization of bond principal prior to maturity is required. Since the Bonds are subject to optional

tender by the bondholders, TSL has executed a Liquidity Facility which provides funds to purchase TSL Bonds surrendered under the optional tender provisions.

TSL has a construction loan agreement which at TSL's option bears interest at the LIBOR or the prime rate. Principal repayment is due in annual installments each April or be paid in full by November 17, 1998. The loan is secured by a leasehold mortgage on TSL's right and interest in the Station.

TSL has an obligation to the City under an Urban Development Action Grant (UDAG) loan agreement as of September 30, 1992. Principal is to be repaid in $130,000 annual installments each November 29th through 2011. The City's rights under the UDAG loan agreement are secured by a leasehold mortgage.

The UDAG loan bears no interest. The weighted average interest rate on all other borrowings was 6.4% per annum at September 30, 1992.

At September 30, 1992, scheduled maturities of long-term equipment and other debt over the next five years were as follows:

Year Ending September 30	Amounts (In Thousands)
1993	$37,516
1994	10,289
1995	9,800
1996	10,582
1997	11,437
Thereafter	136,495
	$216,119

NOTE 5: LEASING ARRANGEMENTS

Capital Leases

Amtrak leases items of equipment, primarily passenger cars and locomotives, under capital leasing arrangements. At

September 30, 1992 and 1991, the gross amount of assets recorded under capital leases was $220,070,000 and $189,955,000, respectively, with accumulated amortization of $35,502,000 and $24,055,000, respectively. At September 30, 1992, future minimum lease payments under capital leases were as follows:

Year Ending September 30	Amounts (In Thousands)
1993	$21,232
1994	19,646
1995	18,849
1996	21,167
1997	16,364
Thereafter	273,713
	370,971
Less amount representing interest	168,266
Present value of minimum lease payments at September 30, 1992	$ 202,705

Operating Leases

At September 30, 1992, Amtrak was obligated for the following minimum rental payments under operating leases that have initial or remaining noncancelable lease terms in excess of one year:

Year Ending September 30	Amounts (In Thousands)
1993	$7,859
1994	7,659
1995	6,924
1996	6,345
1997	6,159
Thereafter	57,727
	$87,673

Rent expense for the years ended September 30, 1992 and 1991 was $24,034,000 and $25,287,000, respectively.

NOTE 6: CONTINGENCIES

Amtrak is involved in various litigation and arbitration in the normal course of business, including environmental clean-up matters. While the outcome of these matters cannot be predicted with certainty, it is the opinion of management and counsel that the disposition of these matters will not materially affect Amtrak's consolidated financial statements.

Amtrak has self-insured certain risks with respect to losses for third-party liability and property damage. Insurance coverage for liability losses from $25 million to $100 million is provided by insurance companies owned by Amtrak and various other railroads and transit authorities.

In October 1989, Amtrak commenced a lawsuit in federal court against a manufacturer of concrete ties. The complaint alleged premature deterioration of the ties requiring unusually early replacement. Amtrak reached a settlement with the manufacturer. In October 1992, Amtrak received an initial settlement payment of $5,000,000 and has a liquidated claim of $34,000,000 as an unsecured creditor in the manufacturer's bankruptcy proceedings.

NOTE 7: RETIREMENT BENEFITS

Pension Plan

Amtrak has a qualified noncontributory defined benefit retirement plan held in trust covering nonunion employees and certain union employees. Benefits are based on years of credited service, and the employee's average compensation during the five highest consecutive years. Amtrak's funding policy is to contribute annually the amount recommended by outside actuaries. Pension expense for 1992 and 1991 was $3,399,000 and $3,292,000, respectively. The following tables set forth the plan's funded status, amounts recognized in the Consolidated Balance Sheets at September 30, 1992 and 1991, and components of the net pension expense for 1992 and 1991 (amounts in thousands):

	1992	1991
Actuarial present value of benefit obligations:		
Accumulated benefit obligation, including vested benefits of $52,688 and $48,805, respectively	$53,409	$49,545
Plan assets at fair value, primarily fixed income investments and listed stocks	$87,015	$80,505
Projected benefit obligation for service rendered to date	78,269	73,884
Plan assets in excess of projected benefit obligation	8,746	6,621
Unrecognized prior service cost being amortized over 11.8 years	5,697	6,386
Unrecognized net gain	(7,516)	(3,570)
Unrecognized net asset existing at October 1, 1986 being amortized over 11.6 years	(5,918)	(6,963)
Prepaid pension expense recognized in Consolidated Balance Sheets	$ 1,009	$ 2,474
Net Pension expense for 1992 and 1991 included the following components:		
Service cost—benefits earned during the period	$ 4,014	$ 4,259
Interest cost on projected benefit obligation	5,591	5,232
Actual return on plan assets	(6,908)	(3,431)
Net amortization and deferral	702	(2,768)
Net pension expense	$ 3,399	$ 3,292

The weighted average discount rate used in determining the projected benefit obligation was 8.0% in 1992 and 1991. The projected rate of increase in future compensation levels was 6.0% in 1992 and 1991. The assumed long-term rate of return on plan assets was 7.0% and 7.5% in 1992 and 1991, respectively. The unfunded accrued pension cost at September 30, 1986, is being amortized over the remaining average service life of plan members, and $1,743,000 and $2,051,000 net of amortization, is included under "Accrued expenses and other current liabilities" in the Consolidated Balance Sheets at September 30, 1992 and 1991, respectively.

Other Postretirement Benefits

Amtrak provides certain of its retirees healthcare and life insurance benefits. Substantially all salaried employees may become eligible for these benefits if they reach retirement age while still working for Amtrak. These benefits are subject to copayment provisions and other limitations. The cost of these benefits is recognized as expense as claims are paid. The total cost of these postretirement benefits charged to income was $1,432,000 and $1,192,000 for 1992 and 1991, respectively.

In December 1990, the Financial Accounting Standards Board issued a new standard on accounting for postretirement benefits other than pensions. This new standard requires that the expected cost of these benefits must be charged to expense during the years that the employees render service. This is a significant change from Amtrak's current policy of recognizing these costs as expense when paid. Amtrak is required to adopt the new accounting and disclosure rules no later than the fiscal year beginning October 1, 1993, although earlier implementation is permitted. Amtrak may adopt the new standard prospectively or via a cumulative catch-up adjustment.

Due to the complexities of the new standard, management has not yet determined the effect that the change in accounting will have on Amtrak's reported financial position and results of operations. However, Amtrak has decided it will adopt the new accounting method by recording a cumulative

catch-up adjustment in the fiscal year beginning October 1, 1993. Management expects that the annual postretirement benefits expense computed in accordance with the new standard will be significantly greater than the annual cash payments.

NOTE 8: SALE OF TAX BENEFITS

Pursuant to provisions of the Economic Recovery Tax Act of 1981, Amtrak sold the rights to the tax benefits associated with certain qualified assets. Cash proceeds from these sales plus accrued interest are subject to certain restrictions, and therefore are presented as a non-current asset and deferred revenue in the Consolidated Balance Sheets. Revenue is recognized to the extent restrictions have been lifted, and funds released to Amtrak. For the years ended September 30, 1992 and 1991, Amtrak recognized revenue of $9,722,000 and $13,384,000, respectively, from these restricted funds.

NOTE 9: INVESTMENTS IN STATIONS

In 1988, Amtrak leased to the Long Island Rail Road Company (LIRR) certain space in Penn Station, New York City, for 99 years, with an automatic 99-year renewal term, along with the right to jointly use the Penn Station operating facilities for 99 years, for a total of $44,400,000. The space rental was accounted for by Amtrak as a sale. The resulting gain of $42,537,000, net of the book value of assets sold, was deferred, and is being recognized as income as expenditures are incurred by Amtrak as a participant under a concurrently executed joint venture agreement with LIRR and the Metropolitan Transportation Authority, to upgrade the Station's structure and centralize control of train movements in and around Penn Station. During the years ended September 30, 1992 and 1991, Amtrak recognized revenue of $6,599,000 and $8,102,000, respectively. As of September 30, 1992, Amtrak has expended $42,039,000 on the project as

required under the joint venture agreement. Future project costs in excess of $45 million will be borne by LIRR up to $90 million, as stipulated in the joint venture agreement. Any costs above $90 million will be shared equally between Amtrak and LIRR.

On April 22, 1992, the limited partners of TSL assigned to Amtrak their 99% partnership interest. Formed in 1987, TSL is engaged in the improvement and rehabilitation of real property leased by it from Amtrak and located at 30th Street Station in Philadelphia, Pennsylvania. Amtrak leases back the property from TSL and, beginning in 1992, consolidates the partnership in the Amtrak consolidated financial statements. The primary impact of the transaction is that approximately $64,318,000 of net fixed assets and $73,284,000 of debt (see Note 4) are now included in Amtrak's Consolidated Balance Sheets.

NOTE 10: SPECIAL CHARGES

During fiscal year 1991, Amtrak incurred special charges of $27,165,000 for a major cost-reduction effort that resulted in a 10% reduction in management positions, the closing of a cogeneration facility, and the divestiture of a commuter rail car assembly contract. The charges were composed mainly of early retirement and voluntary separation incentive payments, operating and contract losses, termination, and other costs.

NOTE 11: SUPPLEMENTAL CASH FLOW INFORMATION

For the years ended September 30, 1992 and 1991, Amtrak engaged in the following investing and financing activities that affected recognized assets, liabilities, and capitalization, but did not result in a change in cash and cash equivalents (amounts in thousands):

	1992	1991
• Obligations incurred in connection with progress payments made by a third party lender on Amtrak's behalf for the construction of passenger cars	$ 1,859	$ 85,310
• Expenditures made for projects along the Northeast Corridor from funds established specially for those purposes	$ 13,117	$ 16,204
• Capital lease obligations incurred in connection with the leasing of new equipment	$ 31,873	
• Obligation incurred in connection with the purchase of locomotives	$ 489	$ 3,177
• Federal paid-in capital from Federal Railroad Administration payment of retirement and unemployment taxes	$150,200	$144,798

As mentioned in Note 9, the limited partners of TSL assigned to Amtrak their 99% partnership interest in a non-cash transaction.

Cash interest of $17,014,000 and $13,109,000 was paid during the years ended September 30, 1992 and 1991, respectively.

* * *

PLAINTIFF'S EXHIBIT 65

NATIONAL RAILROAD PASSENGER CORPORATION
MINUTES OF THE MEETING OF
THE BOARD OF DIRECTORS
February 27, 1991

The Board of Directors of the National Railroad Passenger Corporation held its regular meeting at the offices of the Corporation located at 60 Massachusetts Avenue, N.E. in Washington, D.C. on Wednesday, February 27, 1991 beginning at 9:58 a.m.

Board members Haley R. Barbour; W. Graham Claytor, Jr.; Eugene R. Croisant; Governor Tommy G. Thompson; Darrell M. Trent; Paul M. Weyrich; and Gilbert E. Carmichael, FRA Administrator, representing the Secretary of Transportation, attended the meeting.

Ronald R. Fiedler, alternate for Governor Tommy G. Thompson also attended the meeting.

John F. Cikota and Arrigo P. Mongini from the Federal Railroad Administration (FRA) also attended the meeting.

Mr. Claytor presided as Chairman; Mrs. Bass served as Secretary.

At the Board's request, members of Amtrak's Management Committee, Charles W. Hayward; Harold R. Henderson; William S. Norman and Dennis F. Sullivan joined the meeting.

Resolutions Authorizing the Granting of Systemwide Indoor and Outdoor Advertising Licenses to Transportation Displays, Inc. (TDI)

Mr. Barbour directed the Board's attention to resolutions authorizing the granting of systemwide indoor and outdoor advertising licenses to Transportation Displays, Inc. (TDI). Following discussion, upon motion made by Mr. Barbour and seconded by Governor Thompson, the Board voted to approve the following resolution:

WHEREAS, Transportation Displays Incorporated, (TDI) currently holds licenses dated December 8, 1986 and December 1, 1985, from the Corporation to utilize the Corporation's property for commercial outdoor and indoor advertising purposes; and

WHEREAS, representatives of the Corporation and TDI have reached an agreement in principle whereby the Corporation will grant TDI a renewal of those licenses; and

WHEREAS, the Corporation's revenues are projected to increase by a minimum of $500,000 annually; be it

RESOLVED, That the Corporation is authorized to enter into license agreements with TDI and execute such other documents as may be necessary in order to grant such licenses; and

FURTHER RESOLVED, That the Vice President, Real Estate and Operations Development, is authorized to execute any and all documents on behalf of the Corporation that are required in order to grant such licenses.

Adjournment

There being no further business before the Board, the meeting was adjourned at 11:17 a.m.

/S/ JANE E. BASS
Jane E. Bass
Assistant Corporate Secretary

PLAINTIFF'S EXHIBIT 66

AMTRAK

1976 AMTRAK ANNUAL REPORT

Submitted on February 15, 1977, to the President of the United States, the President of the Senate, and the Speaker of the House of Representatives, pursuant to Sections 308 and 805 of the Rail Passenger Service Act, Public Law 91-518, as amended.

* * *

In 1976, Amtrak's fiscal year was changed, pursuant to Public Law 94-25, to end on September 30 to coincide with the fiscal year adopted by the federal government. Previous annual reports encompassed the calendar year. In order to provide comparable 12-month periods, the months of October through December 1975 are included in both calendar 1975 and fiscal 1976 data.

* * *

PRESIDENT'S REPORT

I am pleased to report that 1976, the year of this country's Bicentennial, was a year of historic proportions for Amtrak, the National Railroad Passenger Corporation.

In 1976 Amtrak became a full-fledged member of the railroad community when, on April 1, it took over direct control of trains and track forces, dispatching, signaling and maintenance of the high-speed Northeast Corridor from Washington, D.C. to Boston, Massachusetts. This acquisition from Conrail, in accordance with the provisions of public law, was the result of long planning and coordinated preparation. Not only did this conveyance double the size of our organization but it added many responsibilities not previously the concern of Amtrak, including the management and direction

of train operations—passenger, commuter and freight—in the most complex railroad region in North America.

Continuing the good progress which I was able to report to you in 1975, after my first ten months with Amtrak, I have witnessed a growing satisfaction on the part of the public with Amtrak.

At the same time, from some areas, 1976 was a year of contention. Many people, some of them in high office, have evidenced impatience and concern over Amtrak. They seem not to realize that an organization with a Congressional mandate to provide rail passenger service on a nationwide basis must begin with a very large infrastructure. Amtrak is this country's first nationwide railroad and it is a developing system. To produce sufficient revenue to cover costs, Amtrak must develop its earning capacity and earning capacity is the product of its passenger cars, trains and their effective utilization. We are doing something about this, but that takes time and money.

During 1976, we have demonstrated what can be done. For example, new Amfleet trains replaced older conventional equipment and with state participation one new train was added on the San Diego-Los Angeles route. Ridership and passenger acceptance rose significantly. In December 1976, we carried 40,972 passengers on that route compared to 22,904 in December 1975, for an increase of 79 per cent. It must be noted that this increase was achieved with new cars and frequency adjustment alone.

Similar increases have been achieved in the same manner in the Pacific Northwest and in Michigan. In all of these places we have been able to demonstrate positively that the business is there. The American public likes to ride trains. In fact, the American public appears to be more ready for trains than most people have thought. They want good trains and we will give them what they want.

Almost 400, out of a total order of 492, of the new Amfleet cars are in service as of the end of calendar 1976. We have an additional 284 Amtrak-designed and Pullman-built bi-level

cars on order for delivery beginning in the summer of 1977 for western service. These new cars will make up the finest trains ever seen in this country.

These new cars are a great asset. They are more reliable and comfortable and they make it possible for our on-board employees to provide better service. We like these new cars because they have more seating capacity and that means more earning capacity. All of this looks better on the bottom line.

This year was notable because of that factor. Although these new cars came in as inventory replacements for old cars and did not increase total fleet numbers, they did produce the beginning of an upward trend in earnings. We saw a substantial ridership increase in 1976. We handled more than one and one quarter million additional riders in calendar 1976 over 1975 and revenues were up slightly over 13 percent, an increase of $34 million. In other words, new equipment and small, but highly successful, frequency improvements have brought about financial improvements forecasting better things ahead. Speed improvements must await track improvements. All of this will do more to moderate the fears of our critics than anything else. We all want to see Amtrak close the gap between costs and revenues and reduce the call upon federal funds.

This is the meaning of the enthusiasm for the Northeast Corridor project. It will produce dollars. A June 1976 report from Peat, Marwick & Mitchell forecast 31 million rail passengers in the NEC by 1990, about a threefold increase with estimated gross revenues of $300 million. I believe this to be a modest and conservative estimate judging from what I have learned during my recent travels to Europe and Japan. We know there are many eligible corridors in this country where the same potential exists.

In terms of the long history of railroads in America, Amtrak is very young, but now Amtrak is much more certain of where it is going and what must be done to get there. Congress and the Administration sensed correctly the mood of the people when they created Amtrak. What has happened in those intervening years is summed up in this report. it makes an interesting and, may I add, an encouraging commentary on the benefits of public and private cooperative enterprise.

Nowhere is this better demonstrated than in the membership of the Amtrak Board of Directors. Without their hard work, understanding and guidance, this task would be impossible. And sometimes when all of us thought we had encountered something really difficult, we found strength in the support of the Congress and the American public. We are all dedicated to the promise of making the Amtrak concept a success.

/s/ Paul H. Reistrup

1976 HIGHLIGHTS

1976 was a milestone year for Amtrak, one that made the Corporation an operating railroad for the first time in its history and put over 75 percent of its short-distance passengers into new train equipment.

With the takeover of the Northeast Corridor, Amtrak was soon dispatching its own trains between Boston and Washington and maintaining its own track and equipment.

* * *

Ridership Grows

* * *

Amtrak's station program included restoration, refurbishment and new construction. Substantial projects were under way or completed as stations across the country, and additional plans to upgrade smaller city stations this coming year, with matching fund programs for local governments, were announced.

Takeover Of Maintenance Facilities

As part of a steady move toward independence, Amtrak took into its own hands a much larger share of responsibility

for maintenance, repair and overhaul of its rolling stock. Control was assumed of major maintenance facilities in Chicago, Detroit, Buffalo and cities in the Corridor. Ground was broken for a $14.8 million maintenance base at Rensselaer, New York.

* * *

NORTHEAST CORRIDOR

With the acquisition of the Northeast Corridor from the Consolidated Railroad Corporation (Conrail), Amtrak acquired property consisting of 456 routes miles from Boston to Washington, 62 miles from New Haven to Springfield, Massachusetts, and 103 miles from Philadelphia to Harrisburg, for a total of 621 route miles.

The Corridor continued to be operated for the most part by Conrail employees under contract to Amtrak after takeover until agreements could be negotiated between Conrail, Amtrak and the various labor organizations.

Acquisition of the new employees was done by direction of Public Law 94-210 (RRRR Act) which directed that Contrail transfer the Corridor to Amtrak "by purchase or lease" and that Amtrak shall within 180 days after enactment ". . . assume (1) all operational responsibility for intercity rail passenger services . . . and (2) control and maintenance of the properties transferred." The law also said that Amtrak, as an acquiring railroad ". . . shall offer such employment . . . to employees of a railroad from which it acquires properties or facilities (including operating rights) pursuant to this Act."

The first labor contracts negotiated were with the maintenance of way and signalmen's organizations and a total of 1,704 people were transferred to Amtrak by mid-summer. Further labor negotiations resulted in Amtrak assuming 262 train dispatchers, movement directors and power directors, plus almost 2,000 clerical craft employees. An additional 877 employees were acquired through contracts covering tower and block operators, station personnel and policemen.

Approximately 2,600 employees in the maintenance of equipment department had been employed by Amtrak prior to the April 1 takeover of the Northeast Corridor. By September 30, 1976, over 7,600 people were employed by Amtrak in the Corridor, including management personnel.

The last major labor organization contract yet to be negotiated is for train and engine personnel. The contract for this group, numbering about 1,300 people, is expected to be signed sometime in early 1977.

In addition to the right-of-way from Boston to Washington, Amtrak also purchased, as part of the Corridor acquisition, 128 railroad stations plus numerous maintenance shops and yards at key points along the route. These shops not only perform work on Amtrak equipment but do contract work for Conrail and several transportation agencies.

The Corridor is responsible for an average of 960 trains a day, including over 120 Amtrak intercity passenger trains, nearly 660 commuter trains operated under contract for transportation authorities in Massachusetts, New Jersey, Pennsylvania and Maryland, and more than 170 Conrail freight and mail trains.

Emergency track work in the Corridor totaled $6.3 million, while an additional $2.1 million was spent for station rehabilitation. Those funds were made available by the U.S. Department of Commerce for exterior and interior refurbishing of stations in Baltimore, Wilmington, 30th Street Station Philadelphia, Newark, New London, New Haven, Providence and Boston's South Station. Major station renovations totalling $115 million are scheduled to be done under the Northeast Corridor Improvement Project.

FINANCE

Enactment of the Railroad Revitalization and Regulatory Reform Act of 1976 (RRRR Act) demonstrated continued strong federal support of intercity rail passenger service and is the most significant legislation in Amtrak's history.

Following the provisions of this Act, Amtrak acquired ownership and control the Northeast Corridor on April 1, 1976. With this action Amtrak became, for the first time, a fully operating railroad, with control over train movements, construction and railway maintenance activities, and the performance of railroad operating and maintenance activities for the benefit of Conrail and commuter agencies. The RRRR Act also provided for major federal assistance over five years to rehabilitate and improve the acquired properties.

The Congress continued to support rail passenger service with authorizations and appropriations for operations and capital improvements. To minimize the amount of assistance required, while at the same time providing a high quality of service on a nationwide system, management continued its aggressive cost reduction program which was initiated in 1975.

In 1976, Amtrak's fiscal year-end for accounting purposes was changed, pursuant to Public Law 94-25, from December 31 to September 30 to coincide with the fiscal year adopted by the federal government and used in providing federal assistance to the Corporation.

Accordingly, operating changes, discussed in this financial section and shown in the accompanying graphs, reflect comparisons of calendar years through 1975 and the fiscal year ended September 30, 1976. In order to provide comparable 12-month periods, the months of October through December 1975 are included both in 1975 and in fiscal 1976. Operating results for fiscal 1976 include the effects of ownership and control of the Northeast Corridor for six months.

* * *

Revenues

Overall revenue for the Corporation has increased from $163 million in 1972 to $278 million in 1976, for an average annual increase of 15 per cent. This has been accomplished in spite of a temporary decline during the recent recession and

is a dramatic reversal of the continuing downward trend in rail ridership during the decades that preceded Amtrak's inception.

Expense

In 1976, total expenses amounted to $719 million. Approximately 60 percent of this amount was required for salaries and fringe benefits to Amtrak and railroad personnel, with the remaining 40 percent attributable to fuel, materials, interest, depreciation and other expenses. With the assumption of ownership and operation of the Northeast Corridor, Amtrak expenses in the last six months of 1976 reached a new plateau. Establishment of a Northeast Corridor management organization, along with the costs related to ownership of the properties, is expected to increase Amtrak's operating expense levels by approximately $75 million annually.

The impact of inflation continued to widen the gap between actual and constant 1972 dollars.

Operating Deficit

In spite of a 10 percent increase in revenue over 1975, the increase in expenses of 19 percent resulted in a rise in the deficit from $353 million in 1975 to $441 million in 1976. Besides inflation and the ownership and operation of the Northeast Corridor, the increase in expenses, which led to the higher deficit, resulted from addition of new routes and services, and continuing increases in the cost of equipment maintenance and overhaul.

Inflation

Although there was some moderation of the impact of inflation in 1976 as compared to the prior year, these first years of the Corporation's operation have been heavily burdened by wage and price increases. Over 66 percent of the inflation since 1960 has taken place in just the last five years when Amtrak's formation and growth required heavy financial

investment to overcome decades of neglect. Revenue through fare increases could not reasonably be expected to offset the rate of cost growth.

Route Profitability System

In 1976, major improvements to the Route Profitability System was developed. This system is designed to report regularly to the Congress on the financial performance of each train and route in Amtrak's nationwide network. It provides information that is essential in the application of the Route Criteria and Procedures for Evaluating Routes which were adopted by the Congress in March 1976.

Capital Funding

The RRRR Act authorized federal assistance for the acquisition and improvement of properties in the amount of $1.89 billion, with established goals to be met within five years. This is in addition to some $1.1 billion of financing authority provided to date for equipment acquisitions and other capital improvements, and represents a milestone in federal support of intercity rail passenger operations.

* * *

Station Services/Mail, Baggage and Express

* * *

Amtrak also conducted a joint station upgrading program with New York State which included eight stations on the Empire Service route. In cooperation with the State of Illinois, 21 existing stations were rehabilitated on lines between Chicago and Dubuque, Chicago and Galesburg, and Chicago and Springfield.

* * *

PERSONNEL AND ADMINISTRATION

* * *

Security and Loss Prevention

With the inception of the Amtrak Northeast Corridor Railroad Police Program, the Corporation now has over 325 police officers, 77 of whom are serving outside of the Corridor, the balance within it.

During the fiscal year, 3,053 criminal cases were investigated and 501 special security-related investigations conducted, along with 1,036 spot inspections of trains in terminals. On 271 occasions, liaison contact was established with other law enforcement and regulatory agencies. As a result, 133 arrests and prosecutions were made by Amtrak, 45 disciplinary hearings initiated, and 366 cases referred to local, state and federal agencies for appropriate action.

* * *

GOVERNMENT AFFAIRS

State-Supported Services

Rail passenger services provided under section 403(b) of the Rail Passenger Service Act continued to be a major factor in the growth of Amtrak operations. One additional round trip between Los Angeles and San Diego, sponsored by California, joined 11 existing services operated in cooperation with the States of New York, Michigan, Illinois, Minnesota and California, plus several additional trains operated for the Southeastern Pennsylvania Transportation Authority (SEPTA). The State of Nevada also sponsored a weekend special between Los Angeles and Las Vegas during the summer months. Proposals for additional trains are pending from Pennsylvania, Michigan, Illinois, Florida, Missouri, California, two local agencies in Northeastern Pennsylvania and the County of Los Angeles.

Route Development

1976 saw the application of local financing and planning to major upgrading of right-of-way and track conditions. New York, Michigan and California have committed major investments to routes within their states. Participation of state and local agencies will be one of the most important factors in setting priorities for future expansion and improvement of emerging rail passenger corridors.

State and Local Cooperation

Amtrak has announced a $1 million joint station improvement program. This program provides for Amtrak matching funds to communities which desire to upgrade their rail passenger stations. The program, stressing local initiative, is also designed to allow smaller communities to compete, for the first time, on an equal basis with large rail passenger hubs for the limited capital available for station projects.

Grade Crossing Projects

Amtrak is continuing its pilot program for grade-crossing safety improvements in cooperation with state and local governments and the various railroads. The program involves driver and public education as well as installation or improvement of warning devices at crossings. A $1 million matching program was established in 1976 for specific crossing improvements and a similar amount has been budgeted for 1977.

The program focuses on improvements that can eliminate or modify train speed restrictions while increasing safety for motorists as well as Amtrak passengers. The first major project to show results was at Michigan City, Indiana, where a speed restriction has already been lifted. Flashing lights and gates are to be installed at four crossings in the city.

Joint education programs are already underway in Florida and Illinois while six regional grade-crossing pilot programs are in development. The regional projects will assess

improvements needed over an entire route or segment of a route, rather than on a crossing-by-crossing basis.

LEGAL

The major effort of the legal department during the first quarter of 1976 was directed towards acquisition of the rights-of-way, fixed plant and other facilities of the Northeast Corridor. Under the Regional Rail Reorganization Act of 1973, these had been designated for conveyance, first, from the Trustees of the Penn Central Transportation Company to the Consolidated Rail Corporation (Conrail) and then from Conrail to Amtrak.

Amtrak entered into an agreement, dated March 31, 1976, to purchase the Northeast Corridor properties from Conrail at a price equal to the price paid to Penn Central by Conrail, plus Conrail's cost of conveyance. Funds for the acquisition were authorized by Congress under the Railroad Revitalization and Regulatory Reform Act of 1976. Under that Act, as amended subsequent to its initial enactment, the funds have been secured by a note of indebtedness and mortgage lien on the properties running to the Secretary of Transportation. Both the note and the lien, however, are without prejudice to Amtrak's statutory right to acquire, hold, deal with and dispose of the properties.

Claims Responsibilities

The acquisition broadened the Corporation's legal responsibilities, including assumption of responsibility for administering third party liability claims against Amtrak in the Northeast Corridor. These were formerly administered by Penn Central under contract to Amtrak. The contract in question was assigned to Conrail on April 1, 1976, and will expire on February 10, 1977. Outstanding claims, and those arising subsequently, will then be administered directly by the Corporation.

Outstanding claims increased from 1,114 as of January 1, 1976, to 1,344 as of September 30, 1976. In addition, third party claims involving trespassers, which were formerly the responsibility of Penn Central as owner of the Northeast Corridor, are now the responsibility of Amtrak. Furthermore, a substantial increase in the number of Federal Employers Liability Act (FELA) claims administered by the Corporation has occurred and may be expected to continue to increase as the result of an approximate doubling of the number of personnel directly employed by Amtrak. The number of outstanding FELA claims increased from 1,873 as of January 1, 1976, to 3,767 as of September 30, 1976.

As part of the reorganization of bankruptcy railroads under the 1973 and 1976 legislation, the Corporation has also acquired 50 per cent of the stock ownership of both the Washington Union Terminal and the Chicago Union Station Company.

New Orleans Union Passenger Terminal

Also, under the Rail Passenger Service Act's mandate "to operate and control all aspects of its rail passenger service to the extent practicable," the Corporation now directly operates and controls all passenger-related services at New Orleans Union Passenger Terminal. The Corporation is currently negotiating assumption of control of the remaining operational and maintenance services at New Orleans, including maintenance of way and maintenance of equipment.

Exemption Petitions

In Interstate Commerce Commission matters, it continues to be necessary to file petitions for exemptions from the Commission's regulations governing adequacy of service where compliance would not be feasible for either economic or practical reasons. In 1976, fourteen such petitions were granted and none denied. The Corporation is also currently contesting a Commission decision defining terms and conditions of compensation and service for operating its trains over the Texas and Pacific Railway. In the Corporation's opinion, those terms and conditions would result in unacceptably slow schedules at substantially increased costs. The conditions could also give rise to similar adverse effects with operating services provided by other contracting carriers.

The Corporation was successful in obtaining rulings from the U.S. Customs Service to permit the importation of the Swedish and French locomotives for experimental purposes without payment of duty.

Penn Central Suit

During the period of this report litigation against the Trustees of the Penn Central Transportation Company has continued in order to obtain restoration of 360 miles of the main line track in Amtrak's basic system which traverses the entire state of Indiana. In 1974 this main line route, which acts as a major connecting link between Chicago and Cincinnati and between Chicago and Florida, was abandoned for passenger service because of neglect of maintenance. Since then, Amtrak trains have been required to detour over slow freight tracks in order to provide the passenger services required by the Rail Passenger Service Act.

In 1975 the United States District Court for the Southern District of Indiana entered a judgment against the Trustees directing them to restore these 360 miles of line at their own cost by January 1, 1978. The Trustees have appealed this judgment claiming that the Regional Rail Reorganization Act of 1973 has excused them from this obligation. To enforce the Indiana District Court judgment, Amtrak petitioned the Penn Central Bankruptcy Court for an order directing the Trustees to comply with the judgment. This petition was denied and the matter is now on appeal in the United States Court of Appeals for the Third Circuit.

* * *

NATIONAL RAILROAD PASSENGER CORPORATION

BALANCE SHEET

SEPTEMBER 30, 1976 and DECEMBER 31, 1975

Assets

	1976	1975
	(Thousands of dollars)	
Current assets:		
Cash	$ 7,144	$ 3,296
U.S. Government securities, at cost	7,500	17,500
Accounts receivable—		
Customers and other	29,336	17,510
Federal grants (Note 4)	2,431	–
Materials and supplies, at average cost	43,039	23,509
Prepayments and deposits	729	495
	90,179	62,310
Property and equipment (Note 5):		
Passenger cars and locomotives	653,374	473,291
Northeast Corridor (Note 9)	86,366	–
Other	26,248	18,370
	765,988	491,661
Less Accumalated depreciation and amortization	(40,638)	(26,910)
	725,350	464,751
Other assets:		
Long-term advances to railroads	6,810	6,665
Other	3,911	4,575
	10,721	11,240
Total assets	$826,250	$538,301

Liabilities and Capitalization

	1976	1975
	(Thousands of dollars)	
Current liabilities		
Due to banks	$ 12,866	$ –
Accounts payable	39,976	28,620
Railroad operations, net (Note 2)	36,403	7,206
Current portion of capitalized lease obligations	6,320	3,604
Current prtion of mortgage note payable (Note 9)	10,797	–
Accrued expenses	44,521	23,167
Deferred ticket revenue (Note 3)	1,485	3,478
	152,368	66,075
Long-term debt (less current portion (Notes 5 and 9)		
Notes payable, 5.55% to 8.31%	533,300	377,750
Capitalized lease obligations	127,171	103,530
Mortgage note payable	75,569	–
	736,040	481,280
Capitalization (Notes 4 and 7)		
Preferred stock, $100 par value, 1,000,000 shares authorized	–	–
Common stock, $10 par value 40,000,000 shares authorized, 9,385,694 shares outstanding	93,857	93,857
	93,857	93,857

	1976	1975
	(Thousands of dollars)	
Accumulated operating losses before Federal operating grants	(1,368,806)	(1,026,233)
Less-Federal operating granst	1,095,345	817,900
	(273,461)	(208,333)
Federal capital grants	14,524	2,500
Railroad capital payments	102,922	102,922
	117,466	105,422
Total capitalization	(62,158)	(9,054)
Total liabilities and capitalization	$826,250	$538,301

The accompanying notes are an integral part of this balance sheet.

NATIONAL RAILROAD PASSENGER CORPORATION

STATEMENT OF CHANGES IN FINANCIAL POSITION
For the years ended September 30, 1976 and December 31, 1975

	1976	1975
	(Thousands of dollars)	
Operating revenues (Note 3)	$ 277,769	$ 252,697
Operating expenses (Notes 2, 5 and 8):		
Maintenance of way and structures	21,692	12,185
Maintenance of equipment	177,102	134,964
Traffic	35,47	126,840
Transportation	245,763	224,784
Dining and buffet service	52,599	50,450
General	68,931	65,272
Taxes on payroll and property	57,968	46,139
Facilities and equipment rents	6,268	6,349
Total operating expenses	665,794	566,983
General and administrative expense	20,015	16,566
Interest expense	36,391	27,591
Capitalized interest on advances for equipment in production (Note 6)	(6,706)	(5,911)
Total expenses	715,494	605,229
Operating loss before Federal operating grants and Northeast Corridor interest	(437,725)	(352,532)
Northeast Corridor interest (Note 9)	3,618	—
Operating loss before Federal operating grants (Note 4)	$(441,343)	$(352,532)

STATEMENT OF ACCUMULATED OPERATING LOSSES AND FEDERAL OPERATING GRANTS
For the year ended December 31, 1975 and
nine months ended September 30, 1976

	Accumulated operating losses before Federal grants	Federal operating grants (Note 4)	Net
	(Thousands of dollars)		
Balance January 1, 1975	$ (673,701)	$ 472,600	$(201,101)
Operating loss and Federal operating grants for the year ended December 31, 1975	(352,532)	345,300	(7,232)
Balance December 31, 1975	(1,026,233)	817,900	(208,333)
Operating loss and Federal operating grants for the nine months ended September 30, 1976	(342,573)	277,445	(65,128)
Balance September 30, 1976	$(1,368,806)	$1,095,345	$(273,461)

The accompanying notes are an integral part of these statements.

NATIONAL RAILROAD PASSENGER CORPORATION
STATEMENT OF CHANGE IN FINANCIAL POSITION
For the years ended September 30, 1976 and
December 31, 1975

	1976	1975
	(Thousands of dollars)	
Uses of funds:		
Operating loss before Federal operating grants	$441,343	$352,532
Depreciation and amortization (Note 5)	(20,995)	(14,116)
Total cash used for operations	420,348	338,416
Purchase of Northeast Corridor (Note 9)	86,366	—
Other purchases and refurbishments of property	265,171	198,228
Increase in materials and supplies	23,326	13,606
Increase (decrease) in accounts receivable	15,972	(3,277)
Increase (decrease) in other assets	(874)	804
Increase in long-term advances to railroads	145	—
Total uses of funds	810,481	547,777
Sources of funds:		
Notes payable (Note 5)	206,300	156,850
Increase in amount due banks	3,676	—
Federal grants (Note 4)	391,838	346,800
Mortgage note payable (Note 9)	86,366	—

	1976	1975
	(Thousands of dollars)	
Increase in accounts payable and accrued expenses	81,856	25,446
Capitalized lease obligations (Note 5)	41,255	29,301
Other decrease (increase) in working capital	(889)	1,149
Total sources of funds	810,402	559,546
Increase (decrease) in cash and U.S. Government securities	$ (79)	$ 11,769

The accompanying notes are an integral part of this statement.

NATIONAL RAILROAD PASSENGER CORPORATION
NOTES TO FINANCIAL STATEMENTS
September 30, 1976 and December 31, 1975

(1) Change in Fiscal Year—

In 1976 the Corporation's fiscal year-end for accounting purposes was changed pursuant to P.L. 94-25 from December 31 to September 30 to coincide with the year adopted by the Federal government and employed in providing Federal assistance to the Corporation. A year-end of December 31 will continue to be used for reporting to the Interstate Commerce Commission.

(2) Adjustments to Railroad Reimbursements—

Amounts due the contracting railroads are recorded by Interstate Commerce Commission account classification based on reported and estimated expenses, which are subject to audit and adjustment by the railroads and the Corporation. The Corporation's continuing program for auditing monthly costs reported by railroads has resulted in numerous adjustments proposed and settled or under current negotiation. The estimated recovery of proposed adjustments was $8,174,000 at September 30, 1976 and $14,796,000 at December 31, 1975.

(3) Transportation Revenue—

Passenger fares are recorded as operating revenue when the transportation is furnished. Estimated unused tickets are reflected in the financial statements as deferred ticket revenue at selling price.

(4) Federal Funding—

Funds are provided to the Corporation through Federal grants to offset operating losses and for capital acquisitions. Such grants are reflected in the financial statements as they

are released to the Corporation by the Department of Transportation. Such releases are based primarily on projected cash flow of the Corporation. Federal capital grants released to the Corporation were $12,024,000 in the nine months ended September 30, 1976, and $1,500,000 in the year ended December 31, 1975. Federal grant funds appropriated, but not requisitioned, were $702,631,000 at September 30, 1976 and $255,200,000 at December 31, 1975.

(5) Property and Equipment and Related Debt—

The Corporation is authorized to borrow or enter into lease obligations for equipment and other capital purposes for up to $900,000,000 with such obligations being guaranteed by the United States Government. Based upon this authorization, substantial commitments have been made for capital equipment. The Corporation's interest in rolling stock has been assigned to the United States Government as security in connection with the guaranty of debt. Notes payable have been classified as long-term debt in the accompanying financial statements, based on a commitment from the Federal Financing Bank to refinance the obligations for periods extending at least until October 1, 1977. See Note 9, "Northeast Corridor," for information concerning the mortgage note payable.

Property and equipment are stated at cost and are depreciated using the straight-line method over their estimated useful lives. Depreciation expense was $20,995,000 in the year ended September 30, 1976 and $14,116,000 in the year ended December 31, 1975. Certain major items of property acquired through lease agreements are recorded as assets and are depreciated over their estimated useful lives. Substantially all such leases are for 15-year periods beginning in 1973 through 1976.

(6) Capitalized Interest on Advances for Equipment in Production—

The Corporation's policy is to capitalize interest on advances for equipment in production to properly reflect the total cost thereof. The rates used to calculate interest correspond to the rates paid for capital funds.

(7) Capital Stock—

In October 1976, the Board of Directors approved a reduction, subject to the approval of the President of the United States of America, of the authorized but unissued preferred stock from 1,000,000 shares to 10,000 shares and of the common stock from 40,000,000 shares to 10,000,000 shares.

(8) Pension Plan—

The Corporation has a fully funded noncontributory retirement plan covering nonunion employees. Provisions for pension costs were $1,214,000 in the year ended September 30, 1976 and $889,000 in the year ended December 31, 1975.

(9) Northeast Corridor—

In 1976, in connection with the United States Railway Association's Final System Plan, the Corporation acquired the properties of the Northeast Corridor from Consolidated Rail Corporation (Conrail) for $86,366,000 payable in eight annual installments and secured by a mortgage on the properties. During each year beginning October 1, Conrail has the right to offset freight service payments due the Corporation in an amount up to two annual installments on the mortgage note, plus interest. Interest on this note is from 7_% to 10% depending upon triple A bond rates and is to be funded from the appropriation described below.

The Railway Revitalization and Regulatory Reform Act of 1976, as amended, authorized an appropriation of $120,000,000 for the Corporation to acquire the properties of the Northeast Corridor. In this connection, the Corporation

has agreed to issue a mortgage note payable in 2975 to the Federal Government equal to the amounts to be expended for the acquisition and improvement of the properties acquired pursuant to the above Act. As of September 30, 1976, a total of $1,890,000,000 was authorized to be appropriated for these purposes.

* * *

PLAINTIFF'S EXHIBIT 68

United States Railway Association

Final
System Plan

Volume 1

VOLUME I (Parts I and II)

United States Railway Association
FINAL SYSTEM PLAN
for restructuring
Railroads in the Northeast and Midwest Region
pursuant to the
REGIONAL RAIL REORGANIZATION ACT OF 1973

JULY 26, 1975

UNITED STATES RAILWAY ASSOCIATION

BOARD OF DIRECTORS

The approval, adoption and release of this Final System Plan is an act of the Association's entire Board. In joining in this act, not every member of the Board necessarily concurs in every statement or determination in the report.

Arthur D. Lewis, *Chairman*

Gale B. Aydelott
Chairman and President, Denver & Rio Grande Western Railroad
Recommended by the Association of American Railroads

Frank H. Blatz, Jr.
Attorney, Former Mayor of Plainfield, New Jersey
Recommended by National League of Cities and U.S. Conference of Mayors

James E. Burke
Vice President, United Transportation Union
Recommended by American Federation of Labor and Congress of Industrial Organizations

William T. Coleman, Jr.
Secretary of Transportation
Represented by John W. Barnum
Deputy Secretary of Transportation

Samuel B. Payne
Former President, Morgan Stanley & Co. Incorporated
Recommended by the financial community

William W. Scranton
Former Governor of Pennsylvania
Recommended by National Governors' Conference

Charles B. Shuman
Former President, American Farm Bureau
Recommended by shippers and organizations representing shippers

William E. Simon
Secretary of the Treasury
Represented by Edward C. Schmults
Under Secretary of the Treasury

William K. Smith
Vice President, General Mills, Inc.
Recommended by shippers and organizations representing shippers

George M. Stafford
Chairman of the Interstate Commerce Commission

President

Edward G. Jordan *(1974 to July 8, 1975)*

James A. Hagen *(July 9, 1975 to present)*

The Board expresses its appreciation to the following duly authorized representatives who participated in many of the Board's deliberations:

Rodney Eyster, *General Counsel, Department of Transportation (1974 to June 30, 1975)*

Fritz R. Kahn, *General Counsel, Interstate Commerce Commission*

United States Railway Association
2100 Second Street, S.W.
Washington, D.C. 20595

July 26, 1975

Honorable Nelson A. Rockefeller
President of the Senate
Washington, D.C. 20510

Honorable Warren G. Magnuson
Chairman, Committee on Commerce
U. S. Senate
Washington, D.C. 20510

Honorable Carl B. Albert
Speaker of the House of Representatives
Washington, D.C. 20515

Honorable Harley O. Staggers
Chairman, Committee on Interstate and Foreign Commerce
U. S. House of Representatives
Washington, D.C. 20515

Dear Sirs:

The Board of Directors of the United States Railway Association is pleased to submit its Final System Plan in accordance with Section 208(a) of the Regional Rail Reorganization Act of 1973 (P.L. 93-236), enacted January 2, 1974, as amended.

The Final System Plan is approved by the entire Board. Certain viewpoints of individual members relating to specific conclusions and recommendations are noted hereinafter.

The Board believes that this Plan will provide a system that will meet the rail service needs of the Region and that it conforms to the goals and purposes set forth in the Regional Rail Reorganization Act.

Sincerely,

/s/ [illegible]

/s/ [illegible]	/s/ [illegible]
/s/ [illegible]	/s/ [illegible]
/s/ [illegible]	/s/ [illegible]
/s/ [illegible]	/s/ [illegible]
/s/ [illegible]	/s/ [illegible]

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Foreword by Arthur D. Lewis

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* * *

Introduction and Summary

Railroading was the first modern transportation technology and the nation's first big business. Railroads were the dominant form of intercity transportation, both freight and passenger, for about a century. Over the last 30 years, however, a far different industry has evolved. Railroads continue to be the largest carrier of intercity freight, measured by ton-miles, but they no longer dominate intercity transportation.

Among the causes of the relative decline of railroading are the development of efficient competing systems of transportation and the failure of rail cost performance and service quality to improve relative to competitive modes. Thus, the industry has not been able to hold its share of the transportation market. The traffic remaining on the railroads is not always profitable; railroads often are caught in a competitive squeeze between lower-cost waterway transport and faster service by trucks.

Today, large parts of the industry face financial difficulties. Railroad earnings are only three-quarters of their 1947 level, after adjusting for inflation. In recent years cash generated by the industry has been insufficient to meet capital requirements and rates of return on investment are so low that railroads have been unwilling or unable to raise new equity capital.

The railroads' declining market share and accompanying financial problems are most severe in the Northeast and Midwest Region of the country. Revenue ton-miles carried in the ICC's Eastern District (an area roughly equivalent to the Region defined by the Act) actually declined by 16 percent from 1947 to 1974; during the same period total U.S. rail ton-miles showed small absolute growth. Eight carriers in the Northeast and Midwest are bankrupt; outside the Region only the Chicago, Rock Island & Pacific is bankrupt but several others are in precarious financial condition.

Causes of the Decline of Railroading

The financial problems of the railroad industry are due to a number of interrelated factors.

- Railroad facilities are old by the standards of other industries—often poorly located, physically run-down or simply obsolete. A large portion of railroad costs is related to fixed facilities, which makes adaptation to changing circumstances difficult and often contributes to inadequate allocation of fixed facilities costs to specific commodities or movements. Costing difficulties contribute to problems of managing and marketing rail services. Railroad cost structures differ sharply from those of competing modes, a circumstance which poses difficulties in achieving balanced public policy toward all transport modes.

- The rapid rate of technological development in rival forms of transportation since 1920 radically changed the competitive position of the rail industry. Large-scale public support has promoted development of the newer auto, truck, barge, pipeline and airline technologies. Innovations in trucking and the development of modern highway systems have enabled motor carriers to capture 23 percent of total intercity freight ton-miles. The water carrier industry has matured with the development of extensive waterway improvements and modern efficient barge technology. Pipelines now move fluid petroleum and natural gas, and development of coal slurry (particles of coal suspended in water) pipelines may permit this mode to penetrate another key railroad market. The emergence of the automobile and bus and the development of the high-speed, pressurized airplane for medium and long distance travel effectively eliminated the train as a competitor for long distance passenger services.

- Basic changes have taken place in underlying market conditions, such as shifts in the location of industrial

activity and changes in types of freight normally suited to rail transportation. Railroads in the older eastern production centers have heavy investments in fixed facilities oriented toward these centers. As manufacturers relocate plants to newer growth centers, rail traffic at the old locations declines and excess rail capacity results. Industries which consume bulk raw materials from the agriculture mining and forestry sectors of the economy, historically the basic generators of railroad freight, have been declining as a share of GNP as service-oriented, high technology industries advance.

- Railroads were the first large business to be regulated by the federal government and few other industries are regulated so pervasively. Regulation of railroads is related to the industry's technology, industrial organization and financial structure. Railroads are big businesses, ordinarily, because railroad operations are most efficient when conducted on a large volume, mass production basis; the high fixed investment associated with rail technology likewise implies large enterprise. The railroads' large scale of operations and a cost structure that enabled them to price some services monopolistically while engaging in "predatory" competition for other business led to regulation of the industry. Regulation, in turn, has contributed to the inflexibility of rail operations and investment, principally with respect to setting rates, abandoning costly routes and services and changing the corporate structure of the industry. In addition, public policy has restricted the rail industry from taking advantage of different methods of moving goods, except in the case of "grandfather" trucking rights owned by certain railroads.

- For a variety of reasons, there have been insufficient internal funds to maintain and upgrade facilities which, coupled with the lack of private capital or public funds, has resulted in deferred maintenance, further weakening

the competitive position of the lines involved, thus completing the vicious cycle.

All these problems must be attacked if satisfactory rail freight service is to exist in the future. Progress can come from within the industry through improvement of operations and general management. Burdens imposed by public policy can be lessened and intermodal transport policies made more fair. If these changes are accomplished, the railroad industry will be able to overcome its current infirmities and become a more dynamic part of the American industrial economy.

Goals and Issues Underlying the FSP

In enacting the Regional Rail Reorganization Act of 1973 (Act), Congress provided a means for revitalizing rail service in the Northeast and Midwest Region.[1] The declared purposes of the Act are:

- Identification of an adequate rail service system for the Region,
- Reorganization of the Region's railroads into an economically viable system capable of providing adequate and sufficient service,
- The establishment of the United States Railway Association and the Consolidated Rail Corporation.
- Assistance to the states and local and regional authorities for continuation of local rail services threatened with cessation and
- Necessary federal financial assistance at the lowest possible cost to the general taxpayer.

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[1] The Association has identified various desirable changes in this unusually complex and detailed Act. Many of these will be discussed in the body of the plan in connection with related subject matter. Other technical amendments will also prove useful. The Association's legislative proposals will be forwarded to Congress in the near future.

The statutory goals guiding preparation of the Final System Plan (FSP) are outlined in section 206 of the Act. These goals complement the purposes of the Act and offer further direction to the United States Railway Association (Association or USRA) and those who review the Association's work. The Act stipulates that the restructured regional rail system should:

- Be financially self-sustaining,
- Meet regional rail transportation needs adequately,
- Promote improved high-speed rail passenger service in the Northeast Corridor and reflect USRA's identification of other corridors in which major upgrading of track for high-speed passenger operation would yield substantial public benefits.
- Preserve, as much as possible, existing patterns of service,
- Preserve facilities and service for coal transport and conserve scarce energy resources,
- Retain and promote competition,
- Attain and maintain desirable environmental standards,
- Achieve efficiency in train operations and
- Minimize unemployment and adverse effects on communities.

In accordance with its statutory duties, the Association has engaged in extensive studies on a variety of subjects in order to develop an adequate factual background necessary for an appropriate balancing of the goals of the Act. Many of these studies were discussed in the Preliminary System Plan (PSP). The data and conclusions of the studies have been carefully considered and carried forward, as appropriate, into the decisions of the FSP and are reflected throughout the text.

The Association has attempted to meet the challenge of converting the broad purposes and goals of the Act into spe-

cific recommendations for the FSP and has made every attempt to resolve conflicts and balance competing interests. The Association believes the Plan will ensure the preservation of an adequate and financially self-sustaining rail service system, via a combination of coordinated service opportunities, rehabilitated facilitates and improvements in operations.

The Regional Rail System (Chapter 1)

The Association recommends a rail structure for the Region made up of these key components:[2]

- ConRail, which combines most of the services of the Penn Central Transportation Co. (PC), the Central Railroad of New Jersey (CNJ), the Lehigh Valley (LV), the Lehigh & Hudson River (LHR), the Pennsylvania-Reading Seashore Lines (PRSL),[3] a limited section of the Ann Arbor Railroad (AA) and small portions of the Erie Lackawanna (EL) and Reading (RDG);
- The Chessie System, which is offered most EL freight services east of Sterling (Akron), Ohio, most Reading services, access to some CNJ traffic in the Greater Newark, N.J. area and the PC markets in the Charleston, W. Va. area;
- The Norfolk & Western Railroad (N&W), which essentially will continue in its present configuration but which is offered a few route extensions to improve connections with its own or affiliated lines;
- The Delaware & Hudson (D&H), with route extensions necessary to provide it with direct connections to the South and West;

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[2] Property and trackage rights acquisitions necessary to implement these recommendations are displayed in the color fold-out map which accompanies this Report. A second fold-out map shows the ConRail freight service network.

[3] PRSL is not in bankruptcy but has been included in USRA's planning process.

- The other smaller railroads in the Region essentially maintaining their existing route structures;
- Southern Railway (SOU), which is offered the PC main lines on the Delmarva Peninsula and the car float from Cape Charles to Norfolk; and
- Amtrak, which is designated to acquire the Northeast Corridor from Boston to Washington for the development of high-speed passenger service. Most through freight service is expected to be provided over a bypass route, as described in Chapter 2.

The Association believes the indicated industry structure recommendations offer the best approach to reversing the financial plight of the Region's rail industry, while ensuring adequate competition. The Plan contemplates ultimate restoration of the Region's rail system to efficiency levels enjoyed by most railroads in the country. It can also serve as the basis for further evolutionary changes in the regional rail system as may be required.

This basic structure will offer competition between at least two railroads in major markets of the Region, supplemented by the services of the smaller railroads. It will enable such major railroads as Chessie and N&W to continue as solvent carriers, without undermining the chances for ConRail to attain solvency in the private sector. It also should serve to stabilize and in several instances enhance performance of the smaller solvent railroads.

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2

Passenger Service

The Association, in its Preliminary System Plan, discussed the quality, present scope and future potential of railroad passenger services in the Region. The PSP made several recommendations designed to eliminate or reduce the many operational and financial conflicts which have characterized the relationships between passenger and freight interests. USRA believes that passenger and most through freight service should be separated in the Northeast Corridor to help implement improved high-speed service. Ownership or lease and control of facilities in the Corridor and elsewhere should become the responsibility of the dominant user.

USRA reaffirms with minor modifications its recommendations for short to medium distance corridor service elsewhere in the Region. The planned rehabilitation of many freight service routes will be an important factor in the continuation and expansion of passenger service on these routes.

Since publication of the PSP, the Association has worked with Amtrak and other agencies to facilitate the Act's goals respecting improved passenger service. For those situations in which designation of rail facilities essential to passenger service can be made in the FSP, USRA has done so. With respect to certain predominantly or solely-related passenger properties outside the Northeast Corridor, legislative amendment will be required. Further action also will be needed to preserve commuter service over certain properties in the Region.

The Regional Rail Reorganization Act of 1973 directs the Association to consider the needs and service requirements of rail passengers, both intercity and commuter, in its plan to restructure rail service in the Region. Among the goals listed in the Act are:

- Establishment of improved high-speed rail passenger service in the Northeast Corridor (Boston to Washington, D.C.), consonant with the recommendations of the Secretary of Transportation in his report of September 1971.
- Efficient movement of both passengers and freight in the Region in a manner consistent with safe operation,
- Efficient and safe commuter rail service as well as intercity service,
- Coordination with the National Railroad Passenger Corporation (Amtrak) and similar entities and
- Identification of all short to medium distance corridors in densely populated areas in which major upgrading of rail lines for high-speed passenger operation would return substantial public benefits.

The responsibility for provision of intercity passenger service resides with Amtrak. As a rule, state and local agencies have the responsibility for development and operation of rail commuter services. They typically receive financial assistance for these services from the federal government's Urban Mass Transportation Administration (UMTA). Railroads in the Region operate rail commuter service in the metropolitan areas of New York, Philadelphia, Baltimore, Washington, D.C., Boston, Providence, Pittsburgh, Cleveland, Chicago and Detroit.

The railroads in reorganization currently operate more than 90 percent of Amtrak's passenger services in the Region and, in the major eastern seaboard metropolitan areas, most of the suburban commuter services. ConRail, as the successor railroad, thus will be an important factor in the continuation and expansion of passenger service. It is imperative that there be cooperation among ConRail, Amtrak and the various commuter agencies to help develop efficient rail passenger service.

USRA's role is to analyze future prospects for rail passenger services in the Region and to assure continued availabil-

ity of rail facilities that may be required for the proper development of passenger service. USRA has established a series of recommendations aimed at alleviating the major causes of past conflicts between passenger and freight interests. The Association also has taken steps in the FSP to facilitate transfer of passenger facilities and operations from the railroads in reorganization to ConRail, Amtrak, the states and commuter agencies as appropriate.

Summary of Passenger Service Recommendations

Following are brief summaries of the recommendations for passenger service. Details of these recommendations are discussed in subsequent sections of this chapter.

- Passenger and freight traffic on the route between New York and Washington on the Northeast Corridor, optimally, should be separated by providing a parallel through freight route comprised of segments of the Baltimore & Ohio (B&O), Reading (RDG), Lehigh Valley (LV) and Central of New Jersey (CNJ) railroads.
- Amtrak should own or lease and provide the management for Northeast Corridor properties, except for segments already owned or leased by state or local transportation authorities.
- Amtrak and ConRail should agree to a series of cost-sharing principles proposed by USRA which are contingent on Amtrak's purchase or lease of the Northeast Corridor.
- Outside the Northeast Corridor, ConRail should own all lines over which Amtrak operates, except for those already owned or leased by state or local transportation authorities and three lines that USRA proposes Amtrak or state agencies purchase or lease because of dominant or exclusive passenger use: Philadelphia to Harrisburg, Pa., New Haven, Conn. to Springfield, Mass. and Porter, Ind. to Kalamazoo, Mich. Implementation of this proposal would require amendments to the Act. Amtrak, states or public authorities also should have the option to purchase or lease passenger related facilities outside the Northeast Corridor, subject to the concurrence of USRA. In the Final System Plan, USRA is designating to ConRail an option to purchase or lease these properties, an option which ConRail may exercise if either of two conditions is satisfied. First, ConRail may exercise the option and a state or public authority may acquire ConRail's interest in these properties or, if the Act is amended to permit such a transaction, Amtrak may purchase ConRail's interest in such properties located outside the Northeast Corridor. The second alternative is that ConRail may exercise the option and own the properties if it reaches agreement with Amtrak for full reimbursement of ConRail's costs in making these properties available for Amtrak use. USRA recommends that ConRail not exercise the option unless one of these conditions materializes.

- Because each local transportation authority's requirements are unique, USRA recommends that ownership and operation of commuter services be resolved individually between ConRail and the respective authorities. USRA has launched the necessary discussions and will continue to facilitate appropriate agreements.
- Because of the limited amount of funds available for all potential borrowers under section 211 of the Act, passenger authorities, wherever feasible, should pursue additional funding from other sources.

Development of the FSP Recommendations

In the Preliminary System Plan, USRA presented an assessment of the scope and quality of passenger service in the Region which detailed the kinds of service offered and the standards achieved by the various operators of intercity and commuter rail passenger services.

Recognizing the need to improve these services, USRA identified short to medium distance intercity corridors holding the potential for successful development of moderate to high-speed rail service, thereby providing social as well as economic benefits to those who might use them.

Also in the PSP, the Association identified areas of operational and financial complexity between passenger and freight service, with specific recommendations directed at eliminating, or at least reducing, conflicts which exist between passenger and freight interests. These recommendations addressed questions such as responsibility for facilities control, passenger service priority over freight and allocation of costs attributable to each service.

Finally, the PSP contained specific recommendations with respect to the special requirements of the Northeast Corridor and outlined a program for separating passenger and freight services on this heavily used route.

Witnesses testifying at the Rail Services Planning Office (RSPO) public hearings had mixed reactions to USRA's preliminary passenger recommendations. The comments fell into two general categories: favorable comments from communities where service improvements are recommended and unfavorable comments from communities which presently do not have service and are not recommended to receive service under proposed route expansion plans.

Communities and shippers throughout the Northeast Corridor expressed generally favorable reaction to USRA's recommendation to move most. ConRail through freight to a parallel route in the Corridor. RSPO endorsed the Association's plan to separate passenger and freight traffic. Such criticism as was expressed at the RSPO hearings was based largely on the incorrect assumption that USRA proposed to remove *all* freight service from the Corridor. *Local freight services to shippers on the Penn Central (PC) line of the Northeast Corridor will continue under USRA's plan.*

Since publication of the PSP, USRA has held additional discussions with the various passenger agencies to facilitate the

transfer of properties necessary to implement the PSP recommendations. USRA has been working very closely with Amtrak, the Chessie System and the Federal Railroad Administration to develop a final plan for the removal of through freight traffic from all or portions of the New York-Washington PC main line. These discussions centered around the purchase or lease by Amtrak of the PC Boston-Washington main line for improved high-speed passenger service and the use (by purchase, lease or other arrangement) by ConRail of B&O's Washington-Philadelphia main line for possible use as the through freight bypass route.

Additional discussions have been held with Amtrak to ensure that intercity passenger service throughout the Region will continue uninterrupted during the transition to ConRail and to coordinate ConRail's rehabilitation schedule with passenger service improvements.

Similar discussions have been held with the various state and regional transportation authorities having jurisdiction over suburban services. These discussions were aimed at facilitating orderly transition and continued operation of the Region's vital commuter rail systems in accordance with the Final System Plan. The discussions related to terms of existing and future contracts, subsidy arrangements, choice of operating agency for services, right-of-way improvements and provision of equipment.

Improvement Program for the Northeast Corridor

The eastern seaboard between Washington and Boston has more than 40 million inhabitants and generates the most intensive intercity rail travel in the country. Over 80 million passenger trips a year are made by all modes, of which 9 percent are by rail. The primary mode, auto, is subject to increased traffic congestion, poor fuel efficiency coupled with possible shortages of petroleum fuels and "spillover costs" in the form of air pollution and accidents. By 1990, the total intercity travel in the area is expected nearly to double, compounding the already severe pressures on the Boston-

Washington corridor's transportation system. USRA's proposed rail improvement program is designed to alleviate these problems by attracting to the rail mode about 21 percent of the projected 1990 Northeast Corridor intercity traffic.

Merely holding the line or effecting minimal improvements to the rail plant will not achieve the best use of potential rail capacity. Comprehensive economic and market analyses of the Northeast Corridor conducted over the past 12 years concluded that fast, frequent service is a prime ingredient of increased passenger demand. Experience with improved high-speed rail in both Great Britain and Japan has confirmed this relationship. The Act requires the establishment of improved high-speed rail passenger service, consonant with the Secretary's 1971 report entitled "Recommendations for Northeast Corridor Transportation." That report, in turn, calls for a plan for service improvements to achieve trip times of approximately 2 hours and 30 minutes in the New York-Washington segment and approximately 3 hours in the New York-Boston segment, with intermediate stop. Nonstop service would reduce these schedules. These times are consistent with those demonstrated in the demand analyses as necessary to achieve a substantial ridership increase.

If a significant shift of future auto and air travel in the Corridor is not achieved, additional airport and highway construction to accommodate future traffic will be required. New investments of this type would be costly not only in dollar amount but also in environmental impact and fuel efficiency.

In the PSO, the Association strongly recommended the separation of passenger and through freight operations in the Northeast Corridor between New York and Washington. This plan offers the most reasonable way to improve passenger and freight operations and can be accomplished, in time, with a reasonable fixed-plant investment. The existing PC route could be released and upgraded for high-speed passenger service and all or some of the parallel route could be upgraded specifically for efficient freight operations, thereby accomplishing the optimum separation of passenger and freight traffic in the Corridor.

USRA has worked with the Department of Transportation to provide more details respecting specific improvements to the Northeast Corridor. The Federal Railroad Administration has developed frameworks for implementing the high-speed rail improvement programs which include several components (some of which are summarized below): System descriptions, operational requirements and the phasing and financing of improvements. The Chairman of USRA is sending a copy of this report to Congress. USRA has not reviewed these alternatives and therefore does not recommend any or all of the options therein discussed.

COST-SHARING PRINCIPLES

USRA made the following specific recommendations for the sharing of ownership and operating costs between passenger and freight operations in the PSP.

- The exclusive user of a facility should own the facility.
- Where passenger and freight services are mixed, the dominant user should own the facility and the other user should pay an avoidable cost for use of the facility.
- Passenger trains should be given priority over freight.
- There should be an incentive program between Amtrak and ConRail to encourage cooperation between the two entities.
- ConRail freight operations should not subsidize passenger operations.
- Passenger entities should make their own arrangements for financing.
- Through freight service should be removed from the PC's Northeast Corridor line between New York and Washington.

- ConRail should not be the owner of the Northeast Corridor.

These policies provide that properties used dominantly or exclusively by a passenger entity should be purchased or leased by that entity. If for some reason the passenger entity does not choose to own or lease a predominantly passenger facility that has viable freight service, ConRail should acquire the line and contract with the passenger entity to compensate ConRail for all the costs of that facility except those which could be avoided in the long term if ConRail, the minority user, were not present.

Since publication of the PSP, these guidelines have been modified slightly and now can be expressed as four principles. These principles have guided USRA in its discussions with Amtrak and the commuter authorities and are the recommended basis for agreement between ConRail and the passenger entities. First, ConRail has the responsibility to provide satisfactory passenger services on all lines in its system in accordance with the policies established above. Second, the provision of those services should not be subsidized by freight services and ConRail should not be burdened with any passenger deficit.[1] Third, passenger operations should have priority over freight operations. Fourth, the exclusive or dominant user of a facility or in some special cases a state or public agency should be its owner.

The following policies regarding ownership and allocation of costs flow from the four basic principles.

- Where facilities exist or are built for the exclusive use of one type of service, i.e., passenger or freight, that entity should bear the full cost of those facilities.
- In instances where two or more passenger entities jointly use an exclusive passenger facility, the responsibility for

[1] The ConRail financial statements shown in Chapter 3 assume ConRail will bear no passenger deficit.

allocating costs on an equitable basis should lie with the users.

- Where freight and passenger operations both use a facility, the dominant user should own the facility and bear all the costs of that facility except those which could be avoided if the minority user were not present. To determine the dominant user, all passenger services, both intercity and commuter, should be considered as one entity and all freight services, regardless of carrier, should be considered as one entity.
- The minority user should bear exclusively the cost of any additional facilities it requires, both existing and proposed.
- Where passenger and freight operations both use a facility on an equal basis, the costs of owning and using the facility should be shared equitably.

System Description and Improvements

The trip time requirements of high-speed rail service necessitate train operating speeds substantially higher than those in effect presently. In turn, those speeds require a roadbed incorporating higher standards of track, allowable force levels, curvature and stability than exist at present.

As a result of the operating requirements for shorter trips times in compliance with the Act, the Corridor plan requires substantial improvements to the physical plant of the PC Washington-Boston main line. The right-of-way will be engineered to allow higher speeds through better track structure and curve improvements, including a limited number of major realignments. The power distribution (electrification) system will be modernized and will extend the entire length of the Corridor. Reliabiltiy and safety will call for new signalling and train-control systems and fencing of the right-of-way. To achieve the necessary trip times with comfort, vehicles must have high power ratings as well as suspension systems allow-

ing a smooth ride. To permit the full freight and passenger separation the Corridor program would include new connecting tracks between the passenger main line and off-Corridor freight route to facilitate the efficient movement of local freight to and from the bypass route. These connections and the upgrading of the B&O south of Philadelphia would be accomplished as operational requirements dictate. Figure 1 describes the off-Corridor freight route between New York and Washington and shows these new connections with the high-speed passenger route.

Phasing the Improvements

Assumptions made in developing the program phases are as follows:

- The program should be phased so the project can be implemented incrementally, with each major element and phase resulting in a discrete improvement.
- Priority should be given to high benefit projects.
- Flexibility in selecting and scheduling of improvements should be maintained.
- There should be opportunity for review prior to major commitments.

Phase I.—This phase restores the Northeast Corridor to 1969 Metroliner service standards. Facilities would be upgraded to support the improved service level. In addition, stations would be rehabilitated, high vandalism areas would be fenced and priority bridge work would commence. To facilitate moving freight service off the Corridor, connections would be constructed between the Corridor line and parallel freight tracks in appropriate geographic areas. Also preparatory work for subsequent phases would be commenced, entailing land acquisitions for track realignment and connections, electrification and signalling system design and vehicle engineering.

Phase II.—This phase, if desirable, would implement the right-of-way program between Washington and New York and between New Haven and Boston. (The New York-New Haven segment is discussed below.) Additional stations would be improved and the right-of-way upgrading program continued. The system test using new rolling stock would be undertaken. At the completion of Phase II, considerable improvements will have been made throughout the Corridor, including upgraded track structure, electrification and signalling. The stations would have undergone improvements and passengers would be enjoying the speed and comfort of a first-class railroad system.

Phase III.—This phase, if desirable, would complete the program. Track work will be completed between New York and New Haven, and yards, shops and maintenance facilities would be upgraded to support the new rolling stock.

USRA lends its support to the development of discrete high-speed passenger services between Boston and Washington consonant with the recommendations of the Secretary of Transportation in his report of September 1971 entitled "Recommendations for Northeast Corridor Transportation." USRA believes that the Corridor improvement program should be completed by the earliest practicable date.

Decisions reflecting the desirability of implementing any or all of these various phases necessarily depend on cost/benefit relationships which USRA has not studied. It should be noted that the costs associated with such improvements have multiplied severalfold since preparation of the Secretary's Report of 1971.

In the Newark-Washington segment, ConRail's through freight service on the passenger corridor would be continued pending orderly transfer of these operations to a bypass route as necessary: Newark-Philadelphia through freight service will be shifted first.

* * *

Financing Northeast Corridor Operations

Extensive analyses conducted by and on behalf of the Department of Transportation indicate that a high speed service level at competitive fares would divert substantial volumes of passenger traffic from other transportation modes and would generated more than enough revenues to cover operating costs. These revenues are not, however, expected to be sufficient to cover interest payments and initial capital costs.

Acquisition of the Northeast Corridor

In keeping with the requirements of the Act and subject to the approval of its Board of Directors, Amtrak intends to acquire the rail properties USRA has designated to be used in the Northeast Corridor improvement project. Amtrak would exercise its option to purchase or lease these properties from ConRail. This arrangement allows an unencumbered assumption of authority and responsibility that will simplify and accelerate the improvement program and afford maximum protection to the public investment.

Rail properties in the Corridor which currently are owned by several state and regional transportation authorities cannot be conveyed to Amtrak under the Act, but Amtrak will continue to exercise operating rights for intercity passenger service on these lines.

The Corridor is defined as such properties presently used in passenger operations on the PC main line route between Boston and Washington, D.C. via New London and the Hell Gate Bridge, including all main line tracks, structures, power and control systems, stations, platforms, passenger yards and shops.

Responsibility for continuation of commuter service should be resolved between the appropriate commuter agency and Amtrak on an equitable basis.

Details of the legal arrangements for designating properties to Amtrak are provided in Part II of this Report.

Operation of the Northeast Corridor

Full operational control of Northeast Corridor traffic now performed by PC should be vested with Amtrak. Amtrak should be responsible for all signalling, dispatching and maintenance in the Corridor. ConRail should provide operating crews, maintenance personnel and line management support under contract to the extent requested and required by Amtrak. Amtrak also should be designated as the single operating entity responsible for coordinating freight and passenger services in accordance with section 601(d)(4) of the Act. The Federal Railroad Administration has recommended the formation of an independent "Dispute Board" to reconcile major differences between intercity, commuter and freight users.

To implement high-speed passenger service, ConRail should continue negotiating with the Chessie System for purchase, lease or trackage rights on the parallel B&O line between Washington and Philadelphia. The ultimate price for these facilities has not been agreed to, but discussions are proceeding within the following framework:

- ConRail will acquire property or trackage rights over the present RDG/LV line between Philadelphia and Newark, N.J., for freight operations.
- ConRail should acquire property or trackage rights over Chessie's line between Philadelphia and Washington, D.C.
- ConRail should not assume the acquisition and improvement costs of the Chessie property, to the extent that such costs exceed those which would be incurred by ConRail in acquiring and rehabilitating the PC route for freight service.

Use of the Chessie route between Philadelphia and Washington appears to be the most effective means to implement the high-speed rail passenger program. As discussions

regarding acquisition or use of this line are not complete and because extensive physical improvements will be necessary, the rerouting of through freight trains between Philadelphia and Washington may take a number of years to accomplish. This, however, should not delay implementation of high-speed Corridor passenger services.

Since ConRail will have rights to RDG/LV tracks at the time of conveyance and because only limited physical improvements are required, the rerouting of through freight trains between Philadelphia and Newark can be achieved fairly rapidly. Shifting freight trains from this, the most congested portion of the Corridor, will allow plant improvements to be made on the passenger line with minimum disruption to intercity and commuter passenger service.

Alternative engineering plans have been developed for continued use of the PC right-of-way between Philadelphia and Washington which would enable the goals of the Corridor improvement program to be achieved even if discussions with Chessie are not successfully completed by the date of conveyance.

Other Amtrak Services

In the PSP, USRA identified a number of short to medium distance corridors where upgrading for passenger service might return substantial benefits. These corridors are listed in Table 1 and, with minor revisions from the map shown at p. 305 of the PSP, displayed as an integrated corridor network in Figure 2. The recommendations are purely advisory: USRA believes Amtrak should have the final responsibility for determining routes to be operated. Additional routes or higher service levels may also result from state-sponsored programs, such as those proposed by New York. With these same qualifications, USRA reaffirms as its final recommendations pursuant to section 206(a)(7) of the Act the routes shown in Table 1 and Figure 2.

Table 1.—*Summary of recommended Corridor services*

Chicago to Milwaukee	Cleveland to Cincinnati
New York to Buffalo	Cleveland to Buffalo
Chicago to St. Louis	Philadelphia to Pittsburgh
Chicago to Detroit	Washington to Pittsburgh
Detroit to Cincinnati	Washington to Norfolk
Pittsburgh to Indianapolis	Detroit to Buffalo
Chicago to Cincinnati	Cleveland to Chicago
Cleveland to Pittsburgh	Indianapolis to St. Louis

A major concern in the restructuring process was the protection of existing passenger service patterns. Amtrak passenger services outside the Northeast Corridor will continue to operate over present routes, with minor exceptions. The problem plaguing these services today is the poor condition of track and roadbed.

Since most of Amtrak's routes correspond to ConRail's main line freight routes, the costs of rehabilitating these lines to the level needed for freight operations should be borne by ConRail. In addition, based on the results of USRA-Amtrak discussions. ConRail should agree to assume the costs of rehabilitating certain limited lines to a level above that needed for ConRail freight service but vital to Amtrak passenger service, for example, the line from Cincinnati to Indianapolis. This line is important for Amtrak's Chicago-Cincinnati trains but is not planned as a principal freight route.

Except for several routes discussed below, all lines required for Amtrak operations should be rehabilitated to a condition permitting the reliable operations of schedules comparable to those in effect on May 1, 1971, provided these lines were used for passenger service at that time, have been in continuous service since then and are incorporated for freight purposes in the ConRail System. Upon completion of the rehabilitation program, Amtrak will be able to operate passenger trains between end points on schedules at least equiv-

alent to those of May 1971. The rehabilitation program, coupled with the policy of giving passenger trains priority over freight, should reduce the scheduled times of passenger trains on most routes in the Region. Ride quality also will be enhanced by the improved track structure. USRA anticipates that most of the rehabilitation program on Amtrak routes can be completed within 5 years.

The recommended ConRail route structure generally will meet Amtrak's requirements. There are several exceptions, however. Some line segments are not recommended for inclusion in the FSP because they are not viable for freight service. These dispositions will affect the routing of Amtrak's intercity service unless alternative arrangements are made. The routes affected are:

- Portions of the Philadelphia to Harrisburg line used by Amtrak's New York to Chicago, New York to Kansas City and Philadelphia to Harrisburg services.
- The line segment from Richmond, Indiana to Indianapolis which is currently used by Amtrak's New York to Kansas City service and
- The segment from Porter, Ind. to Kalamazoo, Mich. which is part of Amtrak's Chicago-Detroit and Chicago-Port Huron services.

USRA has worked closely with Amtrak to find reasonable alternatives. In the case of the Philadelphia-Harrisburg and Porter-Kalamazoo segments Amtrak states or other public agencies will be offered an option to purchase or to lease the lines should the Act be amended to permit these transactions. Alternatively, the line segments could remain with the estate and Amtrak, states or other public agencies could acquire it from that entity. The Richmond-Indianapolis segment will not be used for passenger service because Amtrak is planning to reroute its New York-Kansas City trains via Dayton and Cincinnati on the Columbus-Indianapolis segment. With rehabilitated right-of-way, this diversion will not increase travel time.[2]

As a result of these arrangements, USRA believes that the needs of Amtrak's intercity rail passenger services will be met and that Amtrak's Board of Directors will approve the essential features of this arrangement.

Details of the legal property designations for intercity passenger service are found in Part II of this Report.

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Transfers to Amtrak

Section 206(a)(1)(C) provides that the FSP shall designate which transferable rail properties

> "shall be purchased, leased, or otherwise acquired from the Corporation by the National Railroad Passenger Corporation in accordance with the exercise of its option under section 601(d) of this Act for improvement to achieve the goal set forth in subsection (a)(3) of this section."

Several points need to be made about this subparagraph. In the first place, as noted elsewhere in the chapter in connection with an amendatory proposal, the reference to the "goal set forth in subsection (a)(3)" indicates that the properties Congress had in mind are those needed to provide high speed intercity passenger service in the Northeast Corridor between Boston and Washington and not properties outside the Corridor.

In the second place, subparagraph (C) provides for transfers not from the railroads in reorganization (as in the case of (A) and (B) designations) but from ConRail. Therefore, rail properties must be designated under subparagraph (A) first for transfer to ConRail for the purpose of subsequent transfer from ConRail to Amtrak.

In the third place, Amtrak is required to accept the properties designated for transfer to it under subparagraph (C), but

under section 601(d)(1) Amtrak is given the option to decide whether the transfer will be by sale, lease or other form of acquisition. This option, designed to provide appropriate protection for Amtrak from financial burdens that otherwise might be imposed on it, nevertheless makes it more difficult to project the future of ConRail. ConRail will be required to accept the properties from the estates and provide compensation for them, but how ConRail will be paid for retransferring the properties to Amtrak may depend on the form of transaction Amtrak chooses.

Finally, section 206(d)(5) provides that when rail properties are transferred to Amtrak pursuant to subparagraph (C) they shall be transferred "at a value related to the value received for the transfer to the Corporation of such properties". Accordingly, USRA has estimated the value of these properties, as set forth in Chapter 5 and assumes that the negotiations between ConRail and Amtrak will be based on this estimate. The valuation proceedings conducted under the Act, however, may result in a different value payable to the railroads in reorganization and, consequently, adjustments to the terms on which Amtrak acquires the properties. A further unresolved question, suggested in the opinion of the Special Court, is the extent to which that court may require ConRail to pass through the amounts it receives from Amtrak to the rail estates from which it obtains properties.[8]

* * *

Passenger Service Entities in General

Many of the rail lines and facilities transferred to ConRail are used for intercity and commuter passenger service, as well as for freight operations. The Act provides for the initial designation of such properties for transfer to ConRail under section 206(c)(1)(A), with properties within the Northeast Corridor designated to Amtrak under section 206(c)(1)(C). Amtrak is required to accept the designated properties, but under section 601(d)(1), it has an option as to the type of

interest (ownership, leasehold or other) it will acquire. Other properties initially designated for transfer to ConRail and used in passenger operations also may be made available for subsequent purchase or lease from ConRail by public authorities under section 206(c)(1)(D). In this form such designations provide public authorities with an opportunity, but with no obligation to acquire properties.

Some rail lines and facilities which are not required for, or which cannot support freight operations are needed by Amtrak or others for passenger service. In considering such lines for designation USRA attempted to achieve a proper balance between the Act's goal of efficient and safe intercity rail passenger and commuter service and the other goals set forth in section 206(a).

Amtrak Designations in the Northeast Corridor

The establishment of improved high-speed service in the Northeast Corridor ("NEC") is the third stated goal of the Act (section 206(a)(3)). USRA's designations of properties for acquisition by Amtrak are designed, as required by section 206(c)(1)(C), to achieve that goal. Before making those designations, USRA consulted extensively with Amtrak, the Federal Railroad Administration (which has important statutory functions concerning the Northeast Corridor) and public authorities which use the Corridor for commuter services. All of their views were considered in the designations made.

The Penn Central line from Boston via New London through New York to Washington is designated as the basic Northeast Corridor. This basic Corridor designation includes all the rail lines now used to provide Amtrak intercity passenger service along that route. Excluded is trackage adjacent to the Corridor which is used for commuter service or for freight service, but not for Amtrak service. In the case of the Corridor lines in Massachusetts, New York and Connecticut, which have been purchased by or are under long-term lease to public authorities, the designation reaches only those trackage rights reserved by Penn Central that are necessary to

operate Amtrak services. The underlying fee or lease hold interest of the public authorities is not disturbed.

Passenger yards, shops and other facilities pose a special problem. Those used in common with freight operations are designated in fee to ConRail under section 206(c)(1)(A) and are designated over for acquisition by Amtrak under section 206(c)(1)(C) reserving, as necessary, appropriate user rights to ConRail, the details of which will be specified in the property certifications to be made to the Special Court.

USRA has concluded, however, that where Amtrak use is clearly predominant, or shared with commuter operations, the facilities should not be designated in fee to ConRail under section 206(c)(1)(A). It is possible that Amtrak would choose to take a lease or lesser interest pursuant to section 206(c)(1)(C), rather than the fee interest Conrail would acquire. In such circumstances Conrail in effect would be committing some of its limited capital to fund acquisitions in fee of facilities used principally in passenger service.

While Amtrak's management has indicated to USRA that it would recommend purchasing all assets designated to it pursuant to section 206(c)(1)(C), that recommendation has not been approved by Amtrak's Board of Directors and no final commitment exists. Consequently, as to exclusively passenger facilities, the ESP designates for transfer to ConRail only such leasehold or occupancy and access rights as are necessary to the operation of present passenger services. In addition, the FSP designates the transfer to ConRail of an option, exercisable within 30 days after the Special Court's order of conveyance under section 303(b), to acquire such greater estate or right in such properties, including a fee, as Amtrak may have committed itself to acquire from ConRail not later than 60 days after the effective date of the FSP. The FSP also designates the transfer of such greater estate or right to Amtrak in the event that ConRail exercises the option. This method of designation will permit ConRail and Amtrak to negotiate directly concerning the nature of Amtrak's interest while at the same time reducing the threat to ConRail's

finances that could result if it receives passenger service facilities in excess of those desired by Amtrak.[34]

A similar situation exists with respect to passenger terminals. Most of these terminals are used primarily for passenger services with freight services occupying only limited space for offices or for signalling or other equipment. Future needs of the freight operations do not require the continued use of such space beyond a transition period. Thus, these passenger stations should be viewed as exclusively passenger facilities. As such, they raise the same problem with respect to acquisition as do the passenger yards, shops and other facilities just discussed. Moreover, many of the passenger stations are large and functionally obsolete structures occupying valuable real estate which are not being fully or effectively used by present or anticipated future passenger services. For those reasons, the FSP designates only such leasehold, three-dimensional easements, occupancy and access rights for transfer to ConRail and for designation over to Amtrak as are necessary to the operation of present Amtrak services. The FSP also designates an option to ConRail to acquire greater rights and to transfer them to Amtrak similar to those just discussed with respect to passenger yards, shops and other facilities.[35]

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[34] See the discussion of this complex problem in the Special Court opinion by Judge McGowan. *In re Penn Central Transportation Co.*, 384 F. Supp. 895: 978-981 (Special Court 1974).

[35] One special situation is represented by Washington Terminal, a separately operated Class I terminal company the stock of which is owned 50 percent by railroads in reorganization and 50 percent of Chessie. It is the Association's view that the assets of Washington Terminal Company itself are not reachable under the Act. Amtrak has expressed some interest in acquiring the 50 percent stock interest of Philadelphia, Baltimore and Washington RR Co. in Washington Terminal but has not decided whether it wishes ownership of this stock to achieve its goals in the Corridor. Because the Washington Terminal stock is of no value to Conrail, ConRail would have no interest in acquiring the stock unless Amtrak commits itself to acquire the stock from ConRail. Accordingly, there is designated for transfer to ConRail an option to acquire the stock, exercisable within 30 days after the Special Court order of conveyance, to be exercised only if Amtrak commits itself, no later than 60 days after the FSP effective date, to acquire it from

Amtrak Properties Outside NEC.—Finally, there are problems raised by Amtrak services outside of the Corridor. Most rail lines employed in non-Corridor Amtrak services are included in the lines designated to ConRail for continued freight operations. However, there are a few rail lines[36] and several passenger stations and passenger yards, shops and other facilities which would not be used in freight operations and accordingly are not being designated for transfer to ConRail. USRA has no authority to designate them over to Amtrak; section 206(c)(1)(C) applies only to properties within the Northeast Corridor. As to such lines and facilities, Amtrak may have continuing rights of use and access pursuant to its contract with Penn Central. Amtrak is also free, of course, to negotiate further arrangements with the estates or to use its power under section 402 of the Rail Passenger Services Act. To clarify this situation, however, the Association will recommend an amendment to the Act permitting either the direct designation of rail properties to Amtrak or expanding the scope of section 206(c)(1)(C) to include properties located outside the Northeast Corridor. Properties which would be affected by such an amendment will be identified to Congress when this legislative proposal is submitted.

Commuter Designations.—Rail lines required for present or contemplated operation of commuter trains by state, local or regional transportation authorities fall into three groups: (1) lines designated under section 206(c)(1)(A) for transfer to ConRail and under section 206(c)(1)(C) for designation over to Amtrak; (2) lines designated under section 206(c)(1)(A) to ConRail with no designation over to Amtrak; and (3) lines not designated for transfer to ConRail or offered to a profitable railroad for continued operation.

ConRail. Another special situation involving the Washington Terminal is similarly treated by the designation to ConRail of an option to acquire P.B.& W's 50% interest in a trust agreement relating to the Ivy City Yard (also called the Joint Court Yard).

[36] Royalton to Conewago, Pa., Kalamazoo to Dowagiac, Mich., and Niles, Mich. to Michigan City, Ind.

As to lines designated over to Amtrak, the FSP reserves to ConRail appropriate trackage rights for the operation of commuter services with such trackage rights designated as available for purchase or lease by transportation authorities under section 206(c)(1)(D).

Lines transferred to ConRail (except for freight main lines) and not designated over to Amtrak, are designated under section 206(c)(1)(D), as available for purchase or lease or acquisition of trackage rights by public authorities. If the authorities choose to purchase, trackage rights would be retained for freight operations pursuant to the standard trackage rights terms and conditions.

As to the commuter lines not required for freight operations identified in the Appendix, the FSP designates the transfer to ConRail of an option under which ConRail will have the right to acquire on behalf of a commuter authority the fee, or any lesser interest in the property. The option may be exercised at any time before the expiration of 30 days after the Special Court's order of conveyance under section 303(b), and it is conditioned on ConRail's receiving within 60 days after the effective date of the FSP, a firm commitment from an appropriate commuter authority binding it to assume full responsibility for the obligations that flow from exercise of that option.

No commuter designation is required to preserve the rights of the authorities in Massachusetts, Connecticut and New York to properties they now own or lease. Their present rights are adequate to their needs.

Stations, yards, maintenance and service facilities used by the public authorities fall into the same three categories as rail lines. Accordingly, the designations in the FSP follow that pattern. In the case of facilities not needed for freight operations, the option to be designated to ConRail under section 206(c)(1)(A) also includes the right to acquire a lease or occupancy interest rather than a full fee interest for the reasons stated in the discussion with respect to the designation to Amtrak of stations and facilities in the NEC. ConRail will

acquire the fee interest only if it has received a commitment from the authorities that they in turn will purchase the fee interest from ConRail.

Finally, as a special case, the Rhode Island Department of Transportation has offered to acquire the Penn Central's interest in Providence Union Station and Amtrak has agreed in principle to that acquisition. If the Rhode Island DOT makes a binding commitment to acquire that interest from ConRail within 60 days after the effective date of the FSP, the interest is designated for transfer to ConRail; its availability for purchase or lease by the Rhode Island DOT is designated under section 206(c)(1)(D), subject to Amtrak user rights, which are in turn designated over for acquisition by Amtrak under section 206(c)(1)(C).

If the Rhode Island DOT does not make the commitment within 60 days after the effective date of this Plan, then the designation to ConRail and over to Amtrak, includes the right to acquire such additional interests in the station, subject to commuter service user rights, as Amtrak may designate within that time.

* * *

PLAINTIFF'S EXHIBIT 71

NATIONAL RAILROAD PASSENGER CORPORATION
MINUTES OF THE MEETING OF
THE BOARD OF DIRECTORS
January 23, 1991

The Board of Directors of the National Railroad Passenger Corporation held its regular meeting at the offices of the Corporation located at 60 Massachusetts Avenue, N.E. in Washington, D.C. on Wednesday, January 23, 1991 beginning at 9:40 a.m.

Board members W. Graham Claytor, Jr.; Eugene R. Croisant; Governor Tommy G. Thompson; David F. Girard-diCarlo; Charles Luna; Darrell M. Trent; Paul M. Weyrich; and Gilbert E. Carmichael, FRA Administrator, representing the Secretary of Transportation, attended the meeting.

Ronald R. Fiedler, alternate for Governor Tommy G. Thompson, and David Beightol also attended the meeting.

James T. McQueen and Arrigo P. Mongini from the Federal Railroad Administration (FRA) also attended the meeting.

Mr. Claytor presided as Chairman; Mrs. Bass served as Secretary.

At the Board's request, members of Amtrak's Management Committee, Charles W. Hayward; Harold R. Henderson; William S. Norman and Dennis F. Sullivan joined the meeting.

Resolution Authorizing Changes in the Approval Levels of the Board of Directors

Mr. Claytor directed the Board's attention to a resolution authorizing changes in the approval levels of the Board of Directors. Mr. Claytor explained that at the Board's request, management has reviewed the Board approval levels and submits for the Board's consideration, the changes as outlined in the aforementioned resolution. Governor Thompson stated that he opposed the proposed levels, noting that the approval levels were too high. Mr. Weyrich stated that he initiated reevalua-

tion of the Board approval levels with the thought that the Board will be better able to focus on the issues of major concern if the approval levels were raised. Discussion followed wherein the levels of approval were revised with the consensus of the Board. The Board requested that management provide a quarterly written report itemizing the disposition of all items that fall between the old approval levels and the new approval levels. Upon motion duly made by Governor Thompson and seconded by Mr. Luna, the Board voted to approve the following resolution as amended:

> WHEREAS, the Board of Directors, through its Finance Committee, reviews and approves recommendations of management with regard to the financial affairs of the Corporation, including certain capital and other transactions exceeding the level delegated to management; and
>
> WHEREAS, current approval levels were set many years ago and have not been adjusted to reflect changes in the economy and improvements in managerial and administrative controls; and
>
> WHEREAS, it is the Board's desire to set the approval levels at a threshold that will afford the Board and its Committee the greatest opportunity for an effective review of significant transactions; be it
>
> RESOLVED, That the approval levels for Board authorization are changed as follows and are effective as long as W. Graham Claytor is Chairman of the Board of Directors:

Subject	Change From	Change To
Capital expenditure and leases	$250,000 or more	$1,000,000 or more
Retiring/sale of other assets (non-rolling stock and non-real estate)	$750,000 or more in gross book or sales value	$1,000,000 or more in gross book or sales value
Consulting Services	Over $50,000 or if the contract exceeds 12 months	$200,000 or more
Real estate transactions (excluding sales)	Over $100,000 aggregate consideration for any one transaction	$750,000 aggregate consideration for any one transaction

(8-0)

The public was invited to join the meeting

Adjournment

There being no further business before the Board, the meeting was adjourned at 11:37 a.m.

/S/ JANE E. BASS
Jane E. Bass
Assistant Corporate Secretary

PLAINTIFF'S EXHIBIT 77

NATIONAL RAILROAD
PASSENGER CORPORATION

1990 ANNUAL REPORT

FIVE-YEAR COMPARISON OF AMTRAK'S PERFORMANCE

	1990	1989	1988	1987	1986
Revenues (millions)	**$1,308.4**	$1,269.1	$1,106.7	$ 973.5	$ 861.4
Expenses (millions)	**$2,011.8**	$1,934.5	$1,757.1	$1,672.0	$1,563.6
Revenue-to-Expense Ratio	**.72**	.72	.69	.65	.62
Revenue-to-Short-Term Avoidable Cost Ratio*	**1.20**	1.20	1.15	1.03	.96
Revenue-to-Long-Term Avoidable Cost Ratio**	**.93**	.91	.90	.79	.78
Passenger Miles (millions)***	**6,057**	5,859	5,678	5,221	5,013
Passenger Miles per Train-Mile***	**183.3**	188.4	188.3	176.8	172.2
Systemwide On-Time Performance	**76%**	75%	71%	74%	74%
Ridership (millions)					
Amtrak System	**22.2**	21.4	21.5	20.4	20.3
Contract Commuter	**18.0**	17.4	15.4	10.2****	.7
Total	**40.2**	38.8	36.9	30.6	21.0

* Short-term avoidable costs—Costs of activities that would stop with the discontinuance of a route or train, or begin with the introduction of a new route or train. Such costs include train and engine crews, fuel and power, and maintenance of way.

** Long-term avoidable costs—All short-term avoidable costs, plus claims expenses, heavy maintenance and a portion of corporate and field overhead.

*** Contract commuter passengers not included.

**** Effective January 1, 1987, Amtrak began providing commuter service under contract to the Massachusetts Bay Transportation Authority.

* * *

PRESIDENT'S REPORT

1990 was an important year for Amtrak, for it vividly highlighted the two key factors—one positive and one negative—that ultimately will define our success in the new decade. On the positive side, although Amtrak's financial performance did not meet the aggressive projections originally forecast for the year, the railroad nonetheless had a record year in terms of revenue, ridership and passenger miles. This is a significant and telling achievement, especially when compared to the poor performance this year of other sectors of the travel industry. The continuing growth of Amtrak's market during a time of economic downturn bodes well for a decade of expanding demand for Amtrak service and a better bottom line, particularly as the national economy recovers.

The past year, however, also emphasized the serious infrastructure deficiencies facing Amtrak as a result of a decade of under-capitalization. Amtrak is consuming its assets—passenger equipment, locomotives, facilities, and information systems—at a far faster rate than it is replacing them. The primary challenge of the new decade will be to reverse this trend: to replenish our exhausted fleet of cars in order to maintain and expand ridership, to replace our aging information systems, to continue to improve productivity, and to implement our ambitious plans to eliminate Amtrak's need for federal operating support. At the same time, Amtrak must recommit itself to providing the highest quality of service for our passengers: from accurate travel information, to clean and attractive trains that leave and arrive on time, with service provided by courteous, helpful employees.

Amtrak will pass a milestone on May 1, 1991—our 20th Anniversary. The reemergence of rail passenger service as a marketable, energy-efficient and safe mode of transportation in this country is a tribute to those who had the vision to create Amtrak out of the ashes of a dying rail passenger industry. Today, Amtrak is covering more of its costs with revenue than any comparable passenger railroad in the world. Passengers

are traveling longer distances and more miles than at any time since Amtrak was established. And, we are the operator of choice for commuter rail systems and high-speed systems which are being created to cope with the gridlock facing the nation's highways and airports.

* * *

This coming decade will define the role Amtrak is to play in the nation's future. There is enormous interest in every region of the country for expanded rail passenger service as a means of coping with growing transportation congestion. Recent energy security concerns have only heightened this interest. Yet new service requires capital funds for additional equipment and, in many cases, operating funds to support train service. If Amtrak is to meet the challenge of growing demand and expanding service at the same time it is taking steps to become operationally self-sufficient, it must find a secure, reliable source of capital funds to support investment in new equipment and facilities. We have the managerial skills, the trained employees, the desire, and the dedication to play a dominant role in the American transportation system. With sufficient capital to back us, Amtrak's third decade will be its most dynamic, important and successful yet.

/s/ W GRAHAM CLAYTOR, JR.
W. Graham Claytor, Jr.
President and Chairman

A YEAR OF CONTINUED SUCCESS

* * *

The overwhelming national support for Amtrak was reflected in the enactment this past year of the first free-standing legislation authorizing continued federal support for Amtrak since 1979. On July 6, President Bush signed the Amtrak Reauthorization and Improvement Act of 1990. The new law makes several important changes to the Rail Passenger Service Act, enabling Amtrak to operate more efficiently. It also endorsed Amtrak's continuing efforts to eliminate its need for federal operating support by the turn of the century.

Perhaps even more importantly, the President's signature on the bill will help ensure that decisions involving Amtrak will be made solely on the basis of economics and sound public policy.

NEW SERVICE TO MEET DEMAND

The search for new energy-efficient, environmentally benign means of reducing highway and airport congestion has led many federal and state planners to seek new or more frequent Amtrak passenger service. Amtrak is determined to add new service whenever there is available equipment and the costs of new operations do not require additional federal subsidy. Where new trains will incur significant operating losses, Amtrak continues to look to the state or states through which the train will operate to share costs.

Five new trains were added during FY 1990. All are financially supported in part by state governments and together they represent an important expansion of the Amtrak system. In October 1989, two round trips were added to the *Hiawatha Service* between Chicago and Milwaukee, raising the total number of trains in the service to five. The states of Illinois and Wisconsin are helping fund the new service. Financial support from the state of Alabama made possible the inaugu-

guration of the Birmingham-to-Mobile *Gulf Breeze*, with through service via the *Crescent* to New York. A popular new state-supported *Carolinian* service was added this past spring between Rocky Mount and Charlotte, N.C., with through service to New York.

In addition, the state of California funded the purchase of new equipment necessary to add a third round trip to the very popular *San Joaquin* service between Bakersfield and Oakland. California is leading the nation in looking to state-funded rail projects as an alternative to the severe highway congestion choking its cities. In June, voters approved two rail bond issues that will provide nearly $3 billion for improved and expanded intercity and commuter rail service within the state.

Included in the state's plans are additional *San Joaquin*, *San Diegan* and Santa Barbara trains; improvement of rail passenger stations, including construction of a new station at Jack London Square to replace Amtrak's current Oakland station, which was damaged in last year's earthquake; extension of *San Joaquin* service to Sacramento in the north and Los Angeles in the south; and high-speed rail improvements to permit 125 mph operations along the *San Joaquin* route.

Although California has taken the lead in funding rail service improvements, the demand for new service goes far beyond the Golden State. During FY 1990, Amtrak received more than 350 letters from individual members of Congress and more than 1,000 letters from the general public requesting the institution of new Amtrak routes and service. In addition, Congress directed Amtrak to undertake six new studies of passenger service across the country, including restoration of passenger service between Chicago and Florida via Atlanta, extension of Northeast Corridor service to Maine (including service to southeastern New Hampshire), service between Seattle and Vancouver, restoration of service through Oklahoma, and addition of a second train between Chicago and the West Coast serving central Iowa and Wyoming. Seven states also have requested Amtrak to study new passenger

routes. In some cases, marketing and cost studies may indicate that the requested service would require additional federal subsidy and passenger equipment beyond Amtrak's resources.

* * *

BUILDING CAPACITY FOR A NEW DECADE

Adding new trains, particularly for long-distance routes such as the one being studied between Chicago and Florida, requires a significant investment in additional passenger equipment. Yet, before Amtrak can even consider the needs of new long-distance routes, it must address its shortage of equipment on existing routes and its need to replace the older Heritage fleet with a new generation of modern, efficient and highly marketable cars. The number of cars available for long-distance service actually has declined since receipt of the last Superliner cars in 1982. Sold-out trains represent a lost opportunity for significantly increasing revenues. The goal of eliminating Amtrak's need for federal operating support will not be possible without an enhanced capacity to transport passengers and meet passenger demand.

Amtrak has identified a need for 179 additional bi-level Superliner cars and 223 single-level Viewliner cars to augment capacity and gradually replace the inefficient and aging Heritage fleet of nearly 40-year-old cars. During the past year, Amtrak completed its design specifications for the new Superliners and negotiated with manufacturers for their purchase. Design work on the Viewliner cars also neared completion. In early 1991, Amtrak's Board of Directors will be asked to approve the acquisition of Superliner cars, which could begin arriving in the first half of 1993. The Board also is expected to consider final plans for a Viewliner car order by mid-1991. Much of the funding for these cars will come from the private financial market, supplemented with some federal capital funds.

The new cars will include several important changes mandated by Congress. The Americans With Disabilities Act, enacted in July, requires all new rail passenger cars be accessible to individuals with disabilities. Changes in the design of new cars will reflect Amtrak's goal of providing superior service to all its passengers, including mobility-impaired and other disabled passengers. In addition, cars will include state-of-the-art waste-retention toilet systems to eliminate the need to release wastes along the right-of-way. Amtrak also intends to retrofit many of its existing cars with these new retention systems over the next six years.

When delivered, some of the bi-level Superliner cars will be used to convert *Auto Train*, the *City of New Orleans*, and the *Capitol Limited* from single-level Heritage cars, greatly improving capacity and marketability for these popular trains. Additional sleeping cars on many presently sold-out Western long-distance trains can generate high revenues with little additional operating cost. New cars also will enable Amtrak to make the *Cardinal* a daily train, thereby improving service and providing important new opportunities for handling U.S. Postal Service mail contracts.

* * *

DIVERSIFYING THE REVENUE STREAM

Passenger-related revenues—derived from the sale of passenger tickets and on-board services—make up approximately 71 percent of Amtrak's revenue base. Amtrak intends to look increasingly to its other revenue-making operations to provide the funds necessary to support operations and capital programs in the coming years.

One such area is the transportation of mail, baggage and express, which accounted for $38.4 million in revenue during FY 1990. Contracts with the U.S. Postal Service have become an important growth area for Amtrak and the receipt of new material handling cars, ordered in FY 1989, has provided significant new opportunities for revenue generation.

A second important revenue-generating activity is the operation of contract commuter rail service for state and regional authorities. Amtrak already operates the large MBTA commuter rail system in the Boston area, transporting more than 16 million commuters during FY 1990. Amtrak also runs a portion of the Baltimore-Washington MARC system for the state of Maryland. During 1990, two additional services joined the Amtrak system. Amtrak began operating the *Shore Line East* service for the state of Connecticut between New Haven and Old Saybrook. Commuter service also began between Orange County, Calif., and Los Angeles.

In 1991, Amtrak will begin operating the new *Virginia Railway Express* between communities in Northern Virginia and Washington, D.C. During FY 1990, Amtrak earned $165 million in revenue from contract commuter operations. This is expected to grow to more than $200 million in the next few years as additional services come on line.

In a closely related area, Amtrak is working with a number of states, regional organizations, corporations and consortiums to develop high-speed rail systems in such areas as Florida (between Miami, Orlando and Tampa), Texas (between Dallas and Houston), Texas (between Dallas and Houston), Nevada (between Las Vegas, Nev., and Anaheim, Calif.), and along various Midwest corridors.

These systems are based both on conventional high-speed rail technology, such as the French TGV or German I.C.E. trains, as well as on magnetic levitation. Many high-speed rail planners are looking to Amtrak to operate the new systems, maintain the equipment and rights-of-way, staff stations, as well as coordinate existing intercity rail service with the new high-speed systems. Amtrak strongly supports developments in this area and sees high-speed rail as both a potentially large source of revenue and an important adjunct to its current business.

Real estate development and operations is a third major area to which Amtrak looks for substantial revenue growth. Nearly $40 million was generated in this area during FY 1990

and Amtrak expects this figure to more than double over the next decade. These revenues include rents received from stores and concessions operating in Amtrak-owned stations. Development projects currently under way at Pennsylvania Station in New York, 30th Street Station in Philadelphia, and Union Station in Chicago will result in significant growth in this area. Amtrak also expects to realize significant future revenues from the commercial development of Amtrak-owned air rights. For example, in conjunction with its development partner, Amtrak has prepared a preliminary master plan for development of Amtrak's Sunnyside Yard in Queens, New York. The yard represents one of the largest undeveloped parcels in the entire New York City area.

A WORK FORCE DEDICATED TO SAFE, QUALITY SERVICE

* * *

A prime example of Amtrak teamwork is the interdepartmental effort at the national and local level—called Safe Team On Time—that aims to improve and better control the on-time performance of trains. The groups are studying such issues as platform lengths, mail and baggage loading procedures, and other changes needed to ensure that Amtrak takes all steps within its control to keep to train schedules. The New York Division team, which includes a representative from Metro North Commuter Railroad as well as representatives from each Amtrak department, has made improvements resulting in a division on-time performance of 90.3 percent, up from 88.5 percent in FY 1989. Furthermore, such changes as improved platform lighting and resurfacing station platforms make passenger boarding more pleasant and safer as well as quicker.

* * *

MEETING THE CHALLENGES OF THE NEW DECADE

The nation must make a commitment by investing with Amtrak in capital improvements.

The Amtrak of 1990 looks very different from the fledgling experimental passenger railroad created in 1970. Indeed, it is even difficult to compare the two. Amtrak has gone from "rainbow-colored" trains made up of cars heated and cooled by steam, acquired from and operated by the employees of 20 different freight railroads, to a major transportation company with 24,000 employees operating some 220 intercity trains and 459 commuter trains each day. Amtrak has proved there is a market in today's complex national transportation system for reliable and convenient rail passenger service. It also has demonstrated a dramatic improvement in the economics of transporting passengers by rail. It is Amtrak's goal to continue to reduce its need for federal operating support during this decade and ultimately to eliminate it all together.

Operating self-sufficiency is an ambitious, but achievable goal. Essentially, it means Amtrak must surpass in the next decade its dramatic financial improvement of the last 10 years. The fuel that fed the 50 percent improvement in Amtrak's revenue-to-cost ratio between 1981 and 1990 was the heavy infusion of capital during the late 1970s and early 1980s. It was the return on this investment in new cars and facility modernization that led to high growth in revenues and helped put the lid on costs. The next decade will require an even greater capital infusion.

What will an operationally self-sufficient Amtrak look like? There will be a sufficiently large fleet of modern passenger cars to meet the growing demand for existing and expanded service, thereby maximizing passenger revenues. There will be a fleet of fuel-efficient locomotives to provide reliable, on-time service. Cars and locomotives will be maintained on schedule in modern maintenance facilities. Trains between

New York and Boston will take less than three hours, with high-speed locomotives operating along a newly electrified right-of-way at speeds up to 150 mph. Improvements between New York and Washington also will permit 150 mph operations and schedules approaching two hours. A fleet of material handling cars will be carrying large quantities of U.S. mail and earning high revenues. Additional trains will be operating between San Diego and Los Angeles, Los Angeles and Sacramento along the *San Joaquin* route, New York and Albany, Chicago and the West Coast, and Chicago and Florida, many at substantially higher speeds. Amtrak will be operating additional commuter services in several states, as well as one or more new high-speed services. Construction at 30th Street Station in Philadelphia and Sunnyside Yard in Queens will be well under way as development of Amtrak real estate holdings hits full stride. Amtrak's information systems will enable highly efficient operations and maintenance activities and help achieve maximum revenue potential from available train capacity.

It will take substantial capital investment to reach this vision of an operationally self-sufficient Amtrak. As the nation once again considers its transportation needs in an era of $1.50–$2 per gallon gasoline, many argue that funding for Amtrak's capital needs not only makes sense, but is a matter of national necessity. Amtrak agrees. The railroad is willing to finance needed improvements to the maximum extent feasible within the limits of sound financial management. But Amtrak alone simply cannot provide all the capital required to adequately meet the nation's growing need for energy-efficient, safe and environmentally benign transportation. The nation also must make a commitment by investing with Amtrak in these capital improvements.

For the past 20 years, this partnership has produced results of which many Americans are very proud. Amtrak believes the next decade will make most Americans question why there was even a debate about the issue in the first place.

* * *

National Railroad Passenger Corporation and Subsidiaries (Amtrak)

CONSOLIDATED STATEMENTS OF CHANGES IN CAPITALIZATION

	Preferred stock	Common stock	Other paid-in capital	Accumulated deficit	Totals
	(Thousands of dollars)				
Balance at September 30, 1988	$5,476,703	$ 93,857	$3,664,444	$(5,828,923)	$3,406,081
Issuance of preferred stock	579,300	—	—	—	579,300
Federal paid-in capital	—	—	39,433	—	39,433
Federal and state capital payments	—	—	7,548	—	7,548
Net loss	—	—	—	(665,473)	(665,473)
Balance at September 30, 1989	6,056,003	93,857	3,711,425	(6,494,396)	3,366,889
Issuance of preferred stock	560,411	—	—	—	560,411
Federal paid-in capital	—	—	23,612	—	23,612
Federal and state capital payments	—	—	15,150	—	15,150
Net loss	—	—	—	(703,415)	(703,415)
Balance at September 30, 1990	**$6,616,414**	**$ 93,857**	**$3,750,187**	**$(7,197,811)**	**$3,262,647**

The accompanying notes are an integral part of these consolidated statements.

NATIONAL RAILROAD PASSENGER CORPORATION AND SUBSIDIARIES (AMTRAK) NOTES TO CONSOLIDATED FINANCIAL STATEMENTS

For the Years Ended September 30, 1990 and 1989

NOTE 1: SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

Principles of Consolidation

The financial statements reflect the consolidated operations of the National Railroad Passenger Corporation and its wholly-owned subsidiaries, Chicago Union Station Company and Washington Terminal Company. All significant intercompany transactions have been eliminated. Certain reclassifications have been made to the prior year's statements to conform with the 1990 presentation.

Passenger Related Revenue

Passenger fares are recognized as operating revenues when the related transportation services are furnished. Tickets which have been sold but not used are classified as deferred ticket revenues, and are included in the Consolidated Balance Sheets under "Accrued expenses and other current liabilities."

Contracted Services

The Consolidated Statements of Operations include the gross revenues earned and expenses incurred under various arrangements to provide access to the Northeast Corridor, and to perform services for freight railroads and commuter agencies that provide rail services along the Northeast Corridor.

Cash Equivalents

Amtrak considers all financial instruments purchased having a maturity of three months or less to be cash equivalents. Those financial instruments purchased with a maturity of over

three months, and which mature not more than one year from the Consolidated Balance Sheet date, are classified as short-term cash investments.

Property and Depreciation

Property and equipment are stated at cost, and are depreciated using the composite straight-line method over their estimated useful lives. Certain major items of property acquired through capital lease agreements are recorded as assets and are amortized over the shorter of their estimated useful lives or the lease term.

Casualty Losses

Provision is made for Amtrak's portion of the estimated liability for unsettled casualty and accident claims. The current portion of this liability is included in the Consolidated Balance Sheets under "Accrued expenses and other current liabilities." The non-current portion is classified as "Casualty reserves." As of September 30, 1990 and 1989, the current claims liability was $49,800,000 and $46,200,000, respectively.

NOTE 2: FEDERAL AND STATE FUNDING

Funds are provided to Amtrak through federal and state payments for operations and for capital acquisitions and improvements. For funds received from the Federal Government, Section 304 of the Rail Passenger Service Act (45 U.S.C. 544) requires Amtrak to issue to the United States Secretary of Transportation preferred stock equal in par value to all federal operating payments and most federal capital payments received subsequent to October 1, 1981, as well as capital and certain operating payments received prior to that date. Public Law 101-516, approved on November 5, 1990, provides $665,080,000 in federal funds to Amtrak for fiscal year 1991.

Federal paid-in capital, included in the Consolidated Statements of Changes in Capitalization, reflects certain funding received from the Federal Government to finance acquisition of and improvements to property and equipment. In exchange for past and prospective funding, Amtrak issued two promissory notes to the United States. The first note matures on December 31, 2975, and is secured by Amtrak's real property. The second note matures on November 1, 2082, with successive 99-year renewal terms, and is secured by Amtrak's equipment and certain rolling stock. Neither of the notes bears interest, unless prepaid (which Amtrak does not intend to do). The Federal Government's security interest in Amtrak's real property, equipment, and rolling stock entitles it to repayment plus interest in the event Amtrak ceases operations, is acquired by another entity, or seeks relief under bankruptcy or insolvency laws.

NOTE 3: PREFERRED AND COMMON STOCK

At September 30, 1990, 73,100,000 shares of $100 par value preferred stock were authorized, of which 66,164,139 shares were issued and outstanding. During October and November 1990, 888,650 shares of preferred stock were issued at par value, increasing the total number of shares issued and outstanding to 67,052,789. At September 30, 1989, 68,400,000 shares were authorized, of which 60,560,029 shares were issued and outstanding. All issued and outstanding preferred shares are held by the Secretary of Transportation for the benefit of the Federal Government. Dividends are to be fixed at a rate not less than 6% per annum and are cumulative so that no dividends may be paid on the common shares prior to the payment of all accrued but unpaid dividends on the preferred shares. No dividends have been declared. The preferred stockholder is also entitled to a liquidation preference over common shares involving a payment of not less than par value plus all accrued unpaid dividends.

Each share of preferred stock is convertible into 10 shares of common stock at the option of the preferred stockholder.

At September 30, 1990 and 1989, 10,000,000 shares of $10 par value common stock were authorized, of which 9,385,694 shares were issued and outstanding.

NOTE 4: LONG-TERM DEBT

On September 25, 1989, Amtrak entered into concurrent agreements to lease 104 passenger rail cars to a third party for a period of 25 years and sublease them back for a period of 20 years. Under the terms of the lease, the lessee assumed a portion of a loan payable which was due from Amtrak to a third-party lender for advances made on Amtrak's behalf toward the cars' construction. At September 30, 1989, 45 finished cars had been delivered and accepted. The lease was treated as a sales-type lease and the leaseback treated as a capital lease (see Note 5). All remaining amounts due to the third-party lender at September 30, 1989, as well as additional advances made during fiscal year 1990 when the remaining 59 cars were delivered and put under lease.

During June 1990, Amtrak paid off the total remaining debt due under a 1988 conditional sales agreement for the purchase of nine new diesel locomotives by entering into a lease and leaseback arrangement (as discussed in Note 5).

NOTE 5: LEASING ARRANGEMENTS

Capital Leases

The leaseback of the 104 passenger rail cars referred to in Note 4 has been classified as a capital lease, and accounted for $43,833,000 of capital lease obligations at September 30, 1989, relating to the first 45 finished cars delivered and accepted. An additional $64,317,000 of capital lease obligations occurred during fiscal year 1990 when the remaining 59 cars were delivered and accepted.

In May 1990, Amtrak entered into concurrent agreements to lease 70 material handling cars for a period of 36 years and sublease them back from the lessee for a period of 21 years. Under the terms of the lease agreement, Amtrak received a $22,197,000 advance lease payment from the lessee. The lease was treated as a sales-type lease and the leaseback of the cars is being treated as a capital lease. The leaseback accounted for $22,197,000 of capital lease obligation additions during fiscal year 1990.

Also in June 1990, Amtrak entered into concurrent agreements to lease nine diesel locomotives for a period of 34 years and sublease them back form the lessee for a period of 19 years. Under the terms of the lease agreement, Amtrak received a $16,200,000 advance lease payment from the lessee. The lease was treated as a sales-type lease and the leaseback of the locomotives is being treated as a capital lease. The leaseback accounted for $16,200,000 of capital lease obligation additions during fiscal year 1990.

Amtrak leases certain other items of equipment under capital leasing arrangements. At September 30, 1990, the gross amount of assets recorded under capital leases was $190,090,000 with accumulated amortization of $12,469,000. At September 30, 1990, future minimum lease payments under capital leases were as follows:

Year Ending September 30	Amounts (In Thousands)
1991	$ 17,559
1992	19,003
1993	18,374
1994	16,785
1995	15,988
Later years	256,166
	343,875
Less amount representing interest	162,108
Present value of minimum lease payments at September 30, 1990	$ 181,767

* * *

NOTE 10: PENN STATION JOINT VENTURE

On August 5, 1988, Amtrak leased to the Long Island Rail Road Company (LIRR) certain space in Penn Station, New York City, for 99 years, with an automatic 99-year renewal term, along with the right to jointly use the Penn Station operating facilities for 99 years, for a total of $44,400,000. The space rental was accounted for by Amtrak as a sale. The resulting gain of $42,537,000, net of the book value of assets sold, was deferred, and is being recognized as income as expenditures are incurred by Amtrak as a participant under a concurrently executed joint venture agreement with LIRR and the Metropolitan Transportation Authority, to upgrade the Station's structure and centralize control of train movements in and around Penn Station. During the years ended September 30, 1990 and 1989, Amtrak recognized revenue of $4,211,000 and $2,095,000, respectively. The gross lease proceeds of $44,400,000, plus a pro rata share of future interest income have been designated to fund Amtrak's obligations under the joint venture agreement, and are presented net of joint venture project costs incurred, under "Other Assets and Deferred Charges" in the Consolidated Balance Sheets.

* * *

PLAINTIFF'S EXHIBIT 81

LEVEL A AND PLATFORM LEASE
PENNSYLVANIA STATION NEW YORK

Date: August 5, 1988

Lessor: NATIONAL RAILROAD PASSENGER CORPORATION
400 North Capitol Street, N.W.
Washington, D.C. 20001

Lessee: THE LONG ISLAND RAIL ROAD COMPANY
Jamaica Station
Jamaica, New York 11435

Premises: Certain Portions of
Pennsylvania Station New York
See Exhibit A

Tax Lot and Block: P/O Block 781, Lots 1 and 2; P/O Subsurface of Block 755, Lot 40.

RECORD AND RETURN TO:

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LEVEL A AND PLATFORM LEASE

THIS LEASE, made as of this 5th day of August 1988, by and between the National Railroad Passenger Corporation, a District of Columbia corporation whose principal place of business is situated at 400 North Capitol Street, N.W., Washington, D.C. 20001 ("Amtrak"), and The Long Island Rail Road Company, a New York public benefit corporation whose principal place of business is situated at Jamaica Station, Jamaica, New York 11435 ("LIRR").

WITNESSETH:

WHEREAS, Amtrak is the owner and operator of the railroad passenger station located in the County, City, and State of New York and known as Pennsylvania Station, being a part of that certain property conveyed by Consolidated Rail Corporation to Amtrak by deed dated as of April 1, 1976; and

WHEREAS, both Amtrak and LIRR utilize Penn Station in the conduct and operation of their respective rail passenger services; and

WHEREAS, Amtrak and LIRR have this date executed a certain Joint Venture Agreement, which provides for the joint development by Amtrak and LIRR of a centralized train control facility, to be situated at or near Penn Station and to control train dispatching and train movements through Penn Station (the "Joint Venture Agreement"); and

WHEREAS, LIRR has heretofore utilized Penn Station pursuant to the terms of that certain Joint Facility Agreement dated January 20, 1966, as amended, between LIRR and Amtrak's predecessor in interest, The Pennsylvania Railroad Company (the "Joint Facility Agreement"); and

WHEREAS, Amtrak and LIRR have this date executed an amended and restated Joint Facility Agreement; and

WHEREAS, Amtrak wishes to lease to LIRR, and LIRR wishes to lease from Amtrak, certain premises within Penn Station, outlined on Exhibit A attached hereto; and

WHEREAS, pursuant to the New York Pennsylvania Station Cooperative Agreement entered into among the Federal Railroad Administration ("FRA"), Metropolitan Transportation Authority ("MTA"), and Amtrak, effective May 25, 1983 ("FRA Cooperative Agreement"), MTA and FRA financed and MTA constructed the West End Concourse, title thereto vested in Amtrak, and the parties wish to include such premises within the LIRR Premises;

NOW, THEREFORE, in consideration of the foregoing, of the mutual promises, covenants, and agreements of the parties herein contained, and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Amtrak and LIRR hereby mutually agree as follows:

ARTICLE I

DEMISE; TEMPORARY OCCUPANCY OF CERTAIN SPACE

Section 1.01. *LIRR Premises.* For and during the term hereinafter specified, Amtrak hereby leases and demises to LIRR, and LIRR hereby rents and hires from Amtrak, a volume of space located on Level "A" of Penn Station from the floor of Level "A" up to certain heights, all as indicated on Exhibit A-2 (such volume of space constituting a portion of Block 781, Lots 1 and 2, and of the subsurface of West 33rd Street), together with (a) Amtrak's interest in the West End Concourse, the surveyed interior dimensions and drawings of which are also shown on Exhibit A-2 (such West End Concourse constituting a portion of the subsurface of Block 755, Lot 40, and of the subsurface of West 33rd Street), (b) certain portions of platforms situated within Zone 2a at track level, as shown on Exhibit A-3 (such platforms constituting a portion of Block 781, Lots 1 and 2, and of the subsurface of

Block 755, Lot 40, and of the subsurfaces of Seventh Avenue, West 33rd Street and Eighth Avenue) and (c) certain stairways, elevators and escalators, as more particularly described on Exhibit A-4, the demise of all of the foregoing being subject to the state of title that exists with respect to the above-described demised premises as of the Effective Date, including title defects (such as easements, liens, encumbrances, leases, tenancies and rights of possession), but provided, however, that the demise shall not be subject to the matters set forth in Exhibit H. The property and interests demised pursuant to the preceding sentence shall be referred to as the "LIRR Premises": All Blocks and Lots referred to in this Section 1.01 are as shown on the Tax Map of the City of New York, County of New York. The fact that the demise is subject to the state of title as of the Effective Date shall not derogate from the rights of the parties set forth in Sections 6.04, 6.05, 8.02, and Exhibits D and E, and shall be applicable to the matters treated in Section 12.01 only as stated in that section. The "floor" referred to in the first sentence of this paragraph shall include such additional area beneath the top surface of the slab as is sufficient to affix appurtenances to such floor. LIRR shall also have the right to use the bottom of the slab of Level B above the LIRR Premises in order to affix appurtenances or suspend false ceilings within the LIRR Premises; provided, however, that such right shall not be exercised in a manner that interferes with Amtrak's pipes, ducts, conduits or other utility equipment located beneath such slab at the time that LIRR exercises such right, or with Amtrak's right under Section 12.02 of this Lease to maintain, repair, renew or replace such facilities. The "portions of platforms" referred to in the first sentence of this paragraph shall consist of the surfaces of platforms 9, 10 and 11, together with the fascia material at the edges of those platforms, and such additional area beneath the surface as is sufficient to affix appurtenances to those platforms, as well as platform lighting fixtures on those platforms, the architectural treatment of surfaces of columns on those platforms, and all ceil-

ings, walls, partitions, floors, windows and doors located on or attached to such platforms. (The "Zones" referred to in this Lease are as described in the Joint Facility Agreement, as it exists on the Effective Date.) LIRR shall have the right, subject to the provisions of Section 6.01, to construct additional stairways or other means of access between platforms 9, 10 and 11 and the space located on Level A leased herein, and upon construction, such stairways or other means of access shall become part of the LIRR Premises. For purposes of this Lease, "Penn Station" shall mean the railroad passenger terminal and related facilities, located generally at and below street level and extending generally from the north side of West 33rd Street on the north to the south side of West 31st Street on the south and from the east side of Seventh Avenue on the east to the east side of 9th Avenue on the west. All portions of Penn Station (including the stairways, elevators, and escalators) other than the LIRR Premises, but excluding the land, facilities and appurtenance at track level, shall be referred to as the "Amtrak Premises."

Section 1.02. *Occupancy of Space Within an Area Controlled by the Other Party*. The parties recognize that, for operating purposes, Amtrak currently occupies certain portions of the LIRR Premises and that LIRR currently occupies certain areas on Level "A" located within the Amtrak Premises. These areas are identified on Exhibit B. It is the intention of the parties that such occupancy be eliminated or at least substantially reduced over the next five years. The parties have exchanged plans indicating their needs to move into space currently occupied by the other and each party agrees to facilitate the implementation of those plans, and any future plans, by vacating space as it becomes needed by the other party. The parties agree to cooperate to minimize the inconvenience or additional cost resulting from such moves and to give as much notice as possible as to when a particular space will be required. If after five years either party continues to occupy any of the identified spaces (or other spaces) located within areas controlled by the other party, then, beginning on the fifth anniversary of the Effective Date of this Lease, but subject to the provisions of Section 7.05 below, rent will be charged for such occupancy at fair market rental value. In the event of a disagreement as to the appropriate rental value, such matter shall be subject to arbitration under Section 10.01.

In addition to the areas shown on Exhibit B, the parties recognize that certain space within the LIRR Premises is, as of the Effective Date hereof, used by Allied Maintenance in connection with its cleaning of both the LIRR Premises and portions of the Amtrak Premises. Insofar as such occupancy relates to the cleaning of the Amtrak Premises, LIRR agrees to continue to make the space available, without charge, until the end of the current term of the contract between Amtrak and Allied Maintenance that is in force as of the Effective Date hereof, at which time such privilege of free occupancy shall terminate. The previous sentence shall confer no third party beneficiary rights upon Allied Maintenance.

Section 1.03. *Title Insurance*. As of the Effective Date, LIRR shall have obtained a title insurance policy ("Title Policy"), insuring its interests in the LIRR Premises. Such Title Policy shall have been reasonably acceptable to Amtrak. Amtrak shall have paid one-half the cost of the policy, up to a maximum payment of $52,275.

In the event a title defect existing as of the Effective Date hereof is discovered that affects LIRR's employment of "New Rights," as that term is defined in Section 12.01(a) below, and except as otherwise provided in Sections 6.04, 6.05 and 8.02 herein, LIRR shall not look to Amtrak for relief. In the event a title defect is discovered that affects LIRR's enjoyment of "Old Rights," as that term is defined in Section 12.01(a) below, and unless the title defect is excepted from or otherwise not covered by the Title Policy, LIRR shall first pursue its remedies against the insurer or co-insurer under the Title Policy, and only if LIRR is not fully compensated by such company shall it assert a claim relating to "Old Rights"

against Amtrak under the Joint Facility Agreement; provided however, that if LIRR is unsuccessful in any "Old Rights" claim against such insurer or co-insurer, and thereafter successfully asserts such claim against Amtrak, Amtrak shall indemnify LIRR against any costs or expenses incurred in the unsuccessful claim against such insurer or co-insurer. If LIRR asserts any "Old Rights" claim against such insurer or co-insurer within the applicable period of limitations, Amtrak agrees not to assert in a subsequent action or proceeding brought by LIRR against Amtrak that the period of limitations expired during the time that such claim, or any action or proceeding based on such claim, was pending and for sixty days thereafter.

Section 1.04. *Entrances to Transit Authority Facilities.* Two areas on Level A that are located at the entrances to facilities of the New York City Transit Authority (indicated on Exhibit A-2) are included in the LIRR Premises so that, as between Amtrak and LIRR, LIRR may exercise control over those areas during the term and renewal term of this Lease. Amtrak makes no representations as to what its rights are with respect to those areas. Amtrak agrees that it shall not take any action, or consent to any action, with respect to those areas that shall interfere with LIRR's enjoyment of those areas under this Lease. However, notwithstanding any other provision of this Lease, Amtrak shall have no liability to LIRR for any action of a party other than Amtrak, its successors and assigns, with respect to such areas, including the New York City Transit Authority.

ARTICLE II

TERM; RENEWAL

Section 2.01. *Effective Date.* This Lease shall take effect upon payment by LIRR of the full Rental pursuant to Section 3.01 below. The date of that payment is referred to herein as the "Effective Date."

Section 2.02. *Term of Lease.* The original term of this Lease shall commence on the Effective Date, as defined in the preceding section, and shall terminate at midnight on that date which is ninety-nine (99) years after the Effective Date, unless sooner terminated pursuant to the provisions hereof (the "Original Term").

Section 2.03. *Renewal Term.* Unless LIRR furnishes Amtrak written notice of LIRR's election not to renew at least two (2) years before the termination of the Original Term hereof, the Lease and the leasehold estate granted hereunder shall continue for an additional term of ninety-nine (99) years (the "Renewal Term"), which Renewal Term shall commence upon the termination of the Original Term of this Lease.

ARTICLE III

RENTAL

Section 3.01. *Rental.* LIRR hereby agrees to pay to Amtrak, for the use and occupancy of the LIRR Premises during the Original Term and the Renewal Term, total rent of thirty-nine million, four hundred thousand dollars ($39,400,000.00). Such amount shall be payable simultaneously with the execution of this Lease. Amtrak and LIRR hereby agree that if for any reason LIRR fails to renew this Lease, or surrenders the LIRR Premises prior to the end of the Original or Renewal Terms, it shall have no right to a refund of any portion of such rental.

ARTICLE IV

REPRESENTATIVES; RESPONSIBILITY FOR DAMAGE; SECURITY

Section 4.01. *Penn Station Representatives.* Amtrak and LIRR shall each appoint a representation (the "Penn Station

Representatives"), who shall, from time to time, confer on and resolve matters involving the use of Penn Station that require the cooperative efforts of the parties, including the allocation of the costs of trash removal from the loading dock area, and controlling access to the service corridor and loading dock areas for trash removal purposes. They shall also consider the promulgation of standards acceptable to both parties for Level A concessions, and standards for cleaning and maintenance of the areas within Penn Station that are of common concern.

Section 4.02. *Responsibility for Damage.* LIRR agrees that if its use or occupancy of the LIRR Premises, its exercise of the right of access in, on, over, under, or across any portion of Penn Station, or its performance of any maintenance, repair, or alteration, results in damage (other than normal wear and tear) to any area of Penn Station, whether or not within the LIRR Premises, then LIRR shall, at its sole expense, cause any such damaged area to be restored to the condition it was in immediately before such damage. Amtrak agrees that if its use or occupancy of Penn Station, its exercise of the right of access in, on, over, under, or across the LIRR Premises, or its performance of any maintenance, repair, or alteration, results in damage (other than normal wear and tear) to the LIRR Premises, then Amtrak shall, at its sole expense, cause any such damaged area to be restored to its condition immediately before such damage.

Section 4.03. *Security.* It shall be the responsibility of LIRR, at its sole expense, to provide security services to the LIRR Premises. It shall be the responsibility of Amtrak, at its sole expense, to provide security services to its premises. Amtrak and LIRR shall make every reasonable effort, including formulation of a plan of coordination, to permit (1) entry by each party's respective security forces through areas of Penn Station controlled by the other as required to effectuate their respective security obligations and to maximize the safety of persons using Penn Station; and (2) effective cooperation between the respective security forces in the event of disturbances within Penn Station or other events requiring mutual assistance.

ARTICLE V

MAINTENANCE AND REPAIR

Section 5.01. *Trash Removal.* Each party, at its own expense, shall be responsible for the removal of trash from its premises, including without limitation all trash produced by its lessees, sublessees, and licensees, to the loading dock area of Penn Station. For this purpose, both the time and manner of the parties' access to and usage of the service corridor and loading dock area and the terms and provisions of any contract for the removal of trash shall follow procedures adopted by the Penn Station Representatives, under which access to and usage of said areas shall be equitably shared by Amtrak and LIRR. The parties shall pay their proportionate share of costs and expenses incurred in connection with the removal of trash from the loading dock area based on their respective shares of the total volume of all trash removed. The parties agree that they shall promptly undertake or commission a joint study of trash removal in order to determine an equitable sharing of the costs of trash removal. Such study shall be completed within 180 days of the Effective Date and the proportionate shares determined by such study shall be applied retroactively to all costs and expenses of trash removal that are subject to sharing on or after the Effective Date. The parties hereby agree that until recalculated in accordance herewith, Amtrak's proportionate share shall be 84.21 percent of the cost of trash removal and LIRR's proportionate share shall be 15.79 percent. Such percentages shall be recalculated promptly after the Effective Date by the Penn Station Representatives and shall be recalculated at the request of either party annually thereafter for each one year period beginning

on each anniversary of the Effective Date. Disputes with respect to procedures for trash removal or allocation of the costs of trash removal shall be subject to arbitration under Section 10.01 below if they cannot be resolved by the parties.

Section 5.02. *Cleaning, Maintenance, Repair, and Replacement.*

(a) LIRR shall, at its sole expense, have the responsibility for cleaning, maintenance, repair, and replacement of all ceilings, walls, partitions, floors, windows, and doors within the LIRR Premises (except within the West End Concourse and except as provided in Section 5.02(b) below and except for space temporarily occupied by Amtrak pursuant to Section 1.02 above) and those stairways, elevators, and escalators and the portions of platforms identified on Exhibit A as part of the LIRR Premises. Except in the case of casualty loss as provided in Section 13.02(a) and except as provided in Section 5.02(b) below, and subject to LIRR's rights under the Joint Facility Agreement, if any, LIRR shall surrender the LIRR Premises at the end of the Original or Renewal Term hereof, as the case may be, or upon an early termination of this Lease pursuant to the provisions hereof, in substantially its present state of repair, reasonable wear and tear excepted. Amtrak shall, at its sole expense, have the responsibility for cleaning, maintenance, repair, and replacement of all ceilings, walls, partitions, floors, windows, and doors in corridors or public areas (including staircases, escalators, and elevators not identified on Exhibit A) within the Amtrak Premises that are substantially used by LIRR passengers, employees, and concessionaires in going to or from the LIRR Premises.

(b) The foregoing provisions establishing responsibility for cleaning, maintenance, repair, and replacement do not extend to the repair and replacement of any structural elements except as specified in Section 6.10 herein, as the parties are not otherwise in agreement as to their obligation to repair and

replace such structural elements, or as to their responsibility to pay for work performed.

(c) Pursuant to the FRA Cooperative Agreement, Amtrak undertook certain obligations with respect to operating and maintaining the West End Concourse (§ 402), indemnifying FRA against liability (§ 403), and maintaining comprehensive insurance coverage for the West End Concourse (§ 404). During any period in which this Level A and Platform Lease is in effect, LIRR shall assume the obligations placed on Amtrak by Sections 402, 403 and 404 of the FRA Cooperative Agreement, except the obligation deriving from Amtrak's ownership, and shall indemnify and hold Amtrak harmless against any liability arising from a claim that such assumed obligations have been breached during such period. Other than the foregoing assumption of obligation, LIRR shall not in this Level A and Platform Lease undertake any new obligation to Amtrak to clean, maintain, repair or replace the West End Concourse; provided, however, that LIRR shall not permit the West End Concourse to deteriorate or become in a state of disrepair such that its condition (1) presents a safety hazard, (2) interferes or threatens to interfere with train movements, the movement of passengers on platforms 7 and 8, or the usage of other facilities within the Amtrak Premises, or (3) constitutes a public nuisance.

Section 5.03. *Emergency Repairs.* In the event of an immediate threat to the safety of persons using Penn Station and, if practicable in the circumstances, after notice to the other party, either party hereto may proceed to undertake such emergency repairs as are reasonably necessary to any portion of Penn Station or to any structure or system therein in order to eliminate or ameliorate such threat. If the obligation to make such repairs would ordinarily have been borne by the other party under the terms of this Lease or under the Joint Facility Agreement, and if, when possible in the circumstances, the acting party has notified, or attempted in good faith to notify, the other party of the emergency and given the

other party an opportunity to act, the other party shall reimburse the acting party for all expenses reasonably incurred in responding to such emergency.

ARTICLE VI

ALTERATIONS

Section 6.01. *Alterations Within LIRR Premises.* LIRR shall have the right to make, or to cause or permit to be made, physical alterations in or to the LIRR Premises without Amtrak's consent, provided that: (1) such alterations do not result in a physical intrusion (except into common pipe and duct galleries and except as provided in Section 7.05 below) into the Amtrak Premises, the portions of Zone 2a outside of the LIRR Premises, or Zones 2b, 2c, 3, 4 or the Third Rail Zone; (2) such alterations do not unduly burden train operations in Zones 2, 3, 4, or the Third Rail Zone; (3) LIRR compensates Amtrak for any additional operating, maintenance or capital costs that Amtrak incurs as a result of such alterations; (4) such alterations, and the work connected with such alterations, do not adversely affect the structural integrity of the Amtrak Premises, the portions of Zone 2a outside the LIRR Premises, or Zone 2b, 2c, 3, 4 or the Third Rail Zone; and (5) except with respect to the West End Concourse, LIRR provides access to the Amtrak Premises for Amtrak, its passengers, employees, and invitees that is at least of equivalent utility to the access that exists on the Effective Date. Except as provided in Sections 6.04 and 7.05 below, Amtrak shall have no right to make, or to cause or permit to be made, physical alterations in or to the LIRR Premises without LIRR's consent.

Section 6.02. *Alterations Within Amtrak Premises or Zone 2c.* Amtrak shall have the right to make, or to cause or permit to be made, physical alterations in or to the Amtrak Premises or Zone 2c without LIRR's consent, provided that:

(1) such alterations do not result in a physical intrusion (except into common pipe and duct galleries and except as provided in Section 7.05 below) into the LIRR Premises, the portions of Zone 2a outside of the LIRR Premises, or Zones 2b, 3, 4 or the Third Rail Zone; (2) such alterations do not unduly burden train operations in Zones 2, 3, 4, or the Third Rail Zone; (3) Amtrak compensates LIRR for any additional operating, maintenance or capital costs that LIRR incurs as a result of such alterations; (4) such alterations, and the work connected with such alterations, do not adversely affect the structural integrity of the LIRR Premises, or Zones 2b, 3, 4 or the Third Rail Zone; and (5) Amtrak provides access to the LIRR Premises for LIRR, its passengers, employees, and invitees that is at least of equivalent utility to the access that exists on the Effective Date. Except as provided in Section 7.05 below, LIRR shall have no right to make, or to cause or permit to be made, physical alterations in or to the Amtrak Premises or Zone 2c without Amtrak's consent.

Section 6.03. *Applicability of Joint Facility Agreement.* Except to the extent changes or additions are permitted or prohibited by other provisions of this Article VI or by Section 7.05 below, nothing in this Lease shall be construed as affecting the applicability of the Joint Facility Agreement to any portion of Zones 2a, 2b, 3 or 4 or the Third Rail Zone that is outside the LIRR Premises.

Section 6.04. *Redevelopment of Air Rights Above Penn Station.* The parties recognize that redevelopment of the air rights above Penn Station is currently being considered, and that any such redevelopment may contemplate the placement of columns, footings, ducts, pipes or similar support or utility conduit structures within the LIRR Premises (other than the West End Concourse) and/or other portions of Zone 2a or Zones 2b, 3, 4 or the Third Rail Zone. This section states the conditions upon which LIRR must give its consent to such redevelopment. If such redevelopment is proposed, and if Amtrak consents to the redevelopment (Amtrak retains the

right to withhold its consent at its sole option or to condition its consent on any terms acceptable to it), LIRR agrees to give its consent to the placement of columns, footings, ducts, pipes and similar support or utility conduit structures within the LIRR Premises and/or other portions of Zone 2a or Zone 2b, 3, 4, or the Third Rail Zone in connection with such redevelopment ("Placement"), and to cooperate in facilitating such Placement (subject to the rights of any third parties), provided that all of the following conditions are met:

(1) Placement must not interfere with (a) LIRR train operations, (b) regular movement of LIRR employees or passengers, or (c) the provision of LIRR passenger services. In determining whether interference with one or more of these activities will occur, the effect thereon of the proposed Placement shall be balanced against proposed ameliorative changes within the affected area (*i.e.*, within the LIRR Premises or within one of the aforementioned zones, as the case may be), and if the net effect would be to leave the LIRR Premises (or the affected zone) in a condition not worse than those Premises (or the affected zone) would be in without the Placement and such ameliorative changes, then no interference shall be found. If LIRR determines that the net effect of a proposed Placement (also taking into account proposed ameliorative changes) would result in interference, it shall provide in writing its reasons for such determination. Such determination shall be presumed to be correct, and in any arbitration proceeding under Section 10.02 concerning such determination, the burden shall be on Amtrak to show that LIRR's determination is incorrect.

(2) The Placement and any ameliorative change proposed must not result in a substantial net loss of usable space. Without limiting the foregoing, any net loss of usable space must be compensated by Amtrak at fair market value.

(3) Amtrak must compensate LIRR for any increased maintenance or capital expenses that LIRR would incur as a result of the Placement and any ameliorative change proposed.

Amtrak shall indemnify and hold LIRR harmless with respect to (a) any payments reasonably made by LIRR to sublessees and licensees on account of the effect of any such Placement (or the ameliorative changes referred to in paragraph (1) above) affecting their leased or licensed premises, and (b) other costs reasonably incurred by LIRR in connection with the effect of the Placement (or such ameliorative changes) on premises under sublease or licensed to third parties.

(4) Amtrak shall be responsible for all damage to the LIRR Premises arising from such Placement (or the ameliorative changes referred to in paragraph (1) above). Further, irrespective of the provisions of Section 13.01 hereof, Amtrak shall be responsible for, and shall defend, settle, and/or satisfy all claims arising from or pertaining to personal injury or property damage relating to the design, construction or installation of such Placement (or ameliorative changes), and shall indemnify and hold harmless LIRR (including officers, agents, employees, and subsidiaries of LIRR) against and from any and all loss, damage and expense arising from or pertaining to such claims irrespective of the negligence or fault of LIRR, except where such claims result from the gross negligence or wanton or willful misconduct of LIRR.

(5) Pipes and ducts that are part of the proposed Placement must, to the extent feasible, be located above the ceiling height levels of the LIRR Premises in existence on the Effective Date.

(6) LIRR agrees that it has no right to share in direct monetary benefits that Amtrak may receive in exchange for its consent and cooperation in proceeding with redevelopment of the air rights; however, LIRR shall be entitled to require that 10.6% of the Value of Benefits shall be spent on improvements or alterations requested by LIRR (exclusive of alterations, or portions of alterations, designed to ameliorate interference under paragraph 1 above). Without limiting the foregoing sentence, the parties contemplate that the contract or other arrangement between Amtrak and the developer (or

the owner of air rights) shall so provide. The Value of Benefits shall consist of the sum of (a) the cost of improvements or alterations within the Penn Station Building that are requested by Amtrak or LIRR and that the developer (or the owner of the air rights) agrees to make in exchange for Amtrak's consent and cooperation (exclusive of those improvements or alterations that the developer or owner proposes to make for its own benefit, in a plan based on the developer's (or owner's) minimum needs for improvements within the Penn Station Building in respect of its redevelopment of the air rights above the station, and exclusive of alterations, or portions of alterations, designed to ameliorate interference under paragraph 1 above), plus (b) the direct monetary benefits to Amtrak, including the present value of estimated future monetary benefits, and (c) the cost of any other direct benefits received by Amtrak from the developer that are related to locations other than Penn Station in exchange for Amtrak's consent and cooperation in proceeding with redevelopment of the air rights above Penn Station.

Section 6.05. *Redevelopment of Air Rights Above Penn Station—Claim of Superior Right.* The parties recognize that a redevelopment of the air rights may be proposed that (1) would result in the placement of columns, footings, ducts, pipes or similar support or utility conduit structures within the LIRR Premises, and that (2) is not consented to by both LIRR (pursuant to Section 6.04 or otherwise in its sole discretion) and Amtrak ("Unconsented Placement").

(a) *Proposed Unconsented Placement.* In the event an Unconsented Placement is proposed by a third party, and in the event that Amtrak and LIRR are unable to persuade the third party to alter the proposed Unconsented Placement so as to make it acceptable to both parties to this Lease, Amtrak and LIRR agree to use their best efforts to prevent such placement. If desired by either Amtrak or LIRR, such efforts shall included an attempt to obtain injunctive relief. The costs of

any legal action or proceeding shall be shared by the parties equally.

(b) *Occurrence of Unconsented Placement.* If, despite the efforts of the parties to prevent an Unconsented Placement, such Placement nevertheless occurs, LIRR shall have such rights as Amtrak may possess to recover damages, including consequential and punitive damages, from a third party for personal injury or property damage to LIRR, its passengers, employees, assignees, lessees, or tenants, occurring within the LIRR Premises and resulting from an Unconsented Placement, during the effectiveness of this Lease, and Amtrak hereby assigns such rights to LIRR. Amtrak also agrees that if, during the effectiveness of this Lease, Amtrak receives a payment from a third party that includes an amount for such personal injury or damage, Amtrak shall pay to LIRR the amount that represents such personal injury or damage.

(c) *Loss of Space Through Unconsented Placement.* For purposes of this paragraph, space within the LIRR Premises which is subject to this Level A Lease, but not including the West End Concourse, will be referred to as either "New Space" or "Old Space." "New Space" refers to the space noted as such on Exhibit A-5, and "Old Space" is the remainder of the LIRR Premises, other than the West End Concourse. A loss of space will be deemed to have occurred at the time of the Unconsented Placement, or at such other time as work related to the Unconsented Placement deprives LIRR of the use of the space. A loss may be temporary (*e.g.*, at the time of the loss it is anticipated that LIRR will be deprived of the use of space only while construction activities are taking place), permanent (*e.g.*, a column will permanently occupy the space), or a combination of the two (*e.g.*, a column will occupy part of the space but additional space will be required for construction activities).

(1) *Old Space.* If an Unconsented Placement occurs that results in a loss of Old Space at a time when the Joint Facility Agreement is in effect, the rights and responsibility of the

parties with respect to such loss shall be determined as though such Old Space were occupied solely pursuant to the Joint Facility Agreement, rather than this Lease, and as though such space were used for purposes consistent with rights granted to LIRR under that Agreement.

(2) *New Space*. If an Unconsented Placement occurs that results in a loss of New Space, and if at the time of the placement, the loss has not been fully compensated by the third party responsible for the Unconsented Placement, then notwithstanding Sections 1.01 and 12.01, Amtrak and LIRR agree to share the risk of such loss in the following manner.

(A) If the loss occurs after the fifteenth anniversary of the Effective Date, Amtrak shall have no responsibility for any such loss, except as provided in Section 6.05(b) above.

(B) If such loss occurs prior to such fifteenth anniversary, then as to New Space that is expected to be lost permanently, beginning on the date that such New Space is lost and ending upon the expiration of forty years from the Effective Date (or such earlier time as LIRR regains the use of the space), Amtrak shall make available to LIRR substitute space on Level A of Penn Station that (1) is suitable for the same types of non-commercial uses as the space occupied as of the Effective Date hereof by the LIRR ticket receivers (*see* Exhibit B), and (2) has a fair market rental value (estimated as of the date that space is made available and consistently with the highest and best use of the space) equal to one-half of the fair market rental value of the New Space permanently lost by LIRR, reduced by any compensation received by LIRR for such lost space. In the event that substitute space as defined in the preceding sentence is not reasonably available, Amtrak shall pay to LIRR from the date the New Space is lost until the expiration of forty years from the Effective Date (or such earlier time as LIRR regains the use of the space) an annual amount equal to one-half the fair market rental value of the New Space lost by LIRR as a result of the placement, reduced by one-half of any compensation received by LIRR

for such lost space. Amtrak's maximum obligation under this paragraph shall be as set forth in paragraph 6.05(c)(2)(D) below.

(C) If such loss occurs prior to such fifteenth anniversary, then as to New Space that is expected to be lost temporarily, Amtrak shall pay to LIRR from the date the New Space is lost until the date that LIRR regains the use of the space (but no later than the expiration of forty years from the Effective Date) an annual amount equal to one-half the fair market rental value of the New Space temporarily lost by LIRR as a result of the placement, reduced by one-half of any compensation received by LIRR for such lost space. Amtrak's maximum obligation under this paragraph shall be as set forth in paragraph 6.05(c)(2)(D) below.

(D) Amtrak's maximum obligation during any year under subparagraphs (B) and (C) above, *i.e.*, (1) the maximum fair market rental value of all substitute space that Amtrak is required to make available during that year under subparagraph (B), together with (2) total payments for that year that are required under subparagraphs (B) and (C)), shall be $75,000 escalated or de-escalated according to changes in the consumer price index (CPI). The amount of Amtrak's maximum obligation for any year shall be calculated on the anniversary of the Effective Date by multiplying $75,000 by a fraction, the numerator of which is the CPI on such anniversary date and the denominator of which is the CPI on the Effective Date.

(E) In any case in which Amtrak is required to make substitute space available or to make payments to LIRR under this Section 6.05, LIRR shall be obligated to use its best efforts to obtain compensation from any third party responsible for the Unconsented Placement, and if a recovery from such third party is received after the date of the loss, Amtrak's obligation to make space available (or to make payment) to LIRR under this paragraph will thereafter be adjusted to reflect such recovery. Disputes as to whether sub-

stitute space is reasonably available, or as to the fair market value of either the lost space or the substitute space, or as to the amount payable to LIRR, or as to other matters under this Section, shall be subject to arbitration under Section 10.01 below.

Section 6.06. *West End Concourse.* Neither Amtrak nor its successors or assigns shall, without the consent of LIRR, consent to the placement of columns, footings, ducts, pipes or similar support or utility structures within the portion of the LIRR Premises that is the West End Concourse; provided, however, that compliance with the terms of this Lease or with a requirement binding on Amtrak of any agreement in existence on the Effective Date shall not constitute a violation of this prohibition. In the event that a party other than Amtrak, its successors or assignees, places columns, footings, ducts, pipes or similar support or utility structures within the portion of the LIRR Premises that is the West End Concourse, without the consent of Amtrak, Amtrak shall have no responsibility to LIRR in connection with such placement, except the following: (1) Amtrak hereby assigns to LIRR such rights as Amtrak may possess to recover damages, including consequential and punitive damages, from such party for personal injury or property damage to LIRR, its passengers, employees, assignees, lessees, or tenants, occurring within the West End Concourse and resulting from such placement during the effectiveness of this Lease; and (2) if, during the effectiveness of this Lease, Amtrak receives a payment from such party that includes an amount for such personal injury or property damage, Amtrak shall pay to LIRR the amount that represents such personal injury or property damage.

Section 6.07. *Pre-existing Rights.* Nothing in this Article VI, whether express or implied, shall be construed to enlarge any pre-existing rights of any third party in respect of alterations in Penn Station.

Section 6.08. *Notice of Proposed Alterations.* The parties recognize the desirability of mutual participation in the development of plans that have an effect on both parties. Each party shall inform the other of proposed physical changes, additions, or alterations in or above Penn Station as early in the planning process as feasible and the parties shall jointly participate in the development of plans in appropriate cases. Notice of a change, addition, or alteration proposed by either party shall be given in writing, setting forth the details of the proposed action. If any such proposal involves (1) alterations that may require the consent of the other party or (2) possible interference with train operations, the regular movement of passengers or employees, or the provision of passenger services, six months' prior notice shall be given to the other party. Within sixty days after receipt, the party receiving such notice shall either notify the other in writing of its disapproval, stating with reasonable specificity the reasons for its disapproval, or it shall be deemed to have approved the proposed action. In the event of a dispute as to whether consent has been wrongfully withheld under this Article VI or in the event of any other dispute as to whether a proposed action would violate any of the provisions of this Article VI, either party may submit the matter to expedited arbitration under Section 10.02 below at any time after receipt of the written notice of disapproval referred to in the immediately preceding sentence. The proposing party shall not commence any such alterations during the sixty day notice period (unless express written approval to do so has been given by the other party) or during the pendency of any expedited arbitration proceeding under Section 10.02.

Section 6.09. *Approved Alterations.* Notwithstanding the provisions of Sections 6.01 through 6.04 above, insofar as those provisions would otherwise be applicable, and without waiving or limiting the right of the parties to insist upon strict adherence to such provisions in the future, the parties hereby agree that the other may undertake the alterations listed in Exhibits F and G, provided that the party making the change: performs all work in a manner that does not unduly interfere with train operations of the other party, the regular movement

of the other party's employees or passengers, or the provision of that party's passenger services; and compensates the other party for any additional operating, maintenance or capital costs that the other party incurs as a result of such alterations; and provided further that to the extent any such alteration would involve a physical intrusion into the Premises of the other party, such intrusion shall be subject to approval of the other party, which approval shall not be unreasonably withheld.

Section 6.10. *Alterations Required by Law.* All changes in or additions to the LIRR Premises which are required by law, rule or regulation, or by the lawful order of any governmental agency, shall be paid by LIRR. The foregoing sentence shall not apply to structural changes, the responsibility for which is in dispute; provided, however, that (1) during such time as the Joint Facility Agreement is in effect, LIRR shall have the responsibility to pay for structural changes within the LIRR Premises to the extent that LIRR would be responsible for such changes under Article IV, paragraph (1)(c) of the Joint Facility Agreement if this Lease were not in effect, and (2) LIRR shall be responsible for all required changes, whether structural or not, within or to the West End Concourse.

ARTICLE VII

UTILITIES

Section 7.01. *Provision of Utilities.* At all times during the term and renewal term hereof, Amtrak shall supply the LIRR Premises with natural gas or other fuel, steam, electrical power, domestic hot and cold water, and chilled water for air conditioning, as reasonably required. Amtrak shall also provide operational systems for the delivery of such utilities as well as plumbing, drainage, and sewage systems (including pumps and ejectors), fire alarm systems, fire lines, sewage

lines, sprinkler systems, and any other utility systems providing services to the LIRR Premises on the Effective Date hereof. Amtrak shall supply the LIRR Premises with the utilities referred to in the first sentence of this Section 7.01 at no less than the same level of service in the LIRR Premises as exists in the Amtrak Premises. In the event that, at some future date, Amtrak ceases to provide intercity rail passenger service through Penn Station, or if for any other reason it ceases to provide utility services to the Amtrak Premises, Amtrak shall continue to provide such services to the LIRR Premises at no less than the level of service that existed prior to such cessation. In the event that, in anticipation of a cessation of services, Amtrak implements a gradual or phased reduction of utility services to the Amtrak Premises, it shall nevertheless continue to provide utility services to the LIRR Premises at the level of service existing prior to the commencement of such gradual or phased reduction of service. Subject to Section 7.03(d), Amtrak shall repair and maintain the utility systems referred to in this paragraph to the extent necessary to enable Amtrak to provide the level of utility service required by this paragraph.

Section 7.02. *Payment for Utility Services.*

(a) *LIRR Obligations.* LIRR shall be solely responsible for, and shall pay to Amtrak, all direct costs attributable to the use or consumption within the LIRR Premises, or within utility equipment areas occupied by LIRR outside the LIRR Premises, of the utilities referred to in Section 7.01 above, or any other agreed upon utilities that are furnished by or through Amtrak. LIRR shall not be responsible for the direct costs attributable to the use or consumption of such utilities within utility equipment areas occupied by Amtrak within the LIRR Premises, for which Amtrak shall be responsible. The utility equipment areas occupied by LIRR outside the LIRR Premises and those occupied by Amtrak within the LIRR Premises are shown on Exhibit C hereto.

(b) *Engineering Study; Interim Charges*. In order to determine the relative use or consumption of utilities in the LIRR Premises and the Amtrak Premises, the parties have agreed, in the Joint Facility Agreement, that they shall promptly commission a joint engineering study of utility usage within Penn Station. Upon completion of such study, the direct costs of utilities shall be shared by the parties in proportion to the relative use or consumption by the parties and their respective sublessees, concessionaires, and derivative users, as determined by such study. If such study is not completed within 180 days after the Effective Date, the proportions determined by the study shall be applied retroactively, beginning with the date that is 180 days after the Lease Effective Date. Notwithstanding the foregoing, LIRR agrees to pay Amtrak all direct costs attributable to the use or consumption of utilities within the West End Concourse and such payment obligation shall be retroactive to the date that the West End Concourse was placed in service. As part of the joint engineering study, the parties shall determine the amount that Amtrak shall be reimbursed for such use or consumption. Either party may, from time to time, request further studies in order to eliminate any inequities resulting from changes in patterns of utility usage within Penn Station. The parties agree that, from the Effective Date until the completion of the engineering study referred to above: (i) LIRR shall continue to reimburse Amtrak under the Joint Facility Agreement for utility charges allocable to the LIRR Premises; and (ii) LIRR shall remit to Amtrak, promptly upon receipt, all payments on account of utilities received by LIRR from concessionaires situated within the LIRR Premises. Following completion of the joint engineering study referred to above, Amtrak shall provide monthly invoices to LIRR, which shall be issued concurrently with billings under the Joint Facility Agreement, setting forth LIRR's proportionate share of utility charges in respect of the LIRR Premises, and setting forth LIRR's proportionate share of the costs of repairs, replacements, and modifications to utility systems, as determined pursuant to Section 7.03 below.

Amtrak and LIRR shall have such rights to prompt payment, audit, protest, recoupment, and interest in respect of such invoices as are provided in Article VI (14) of the Joint Facility Agreement, which provision, as it may from time to time be amended, is hereby incorporated herein by reference.

Section 7.03. *Repairs, Replacements, and Modifications of Utility Systems*.

(a) *Ordinary Maintenance and Repair*. LIRR shall share in the cost of such ordinary maintenance and repairs of the systems referred to in Section 7.01 above as are necessary to assure continuation of the level of service required by that Section. LIRR's share of the cost of such maintenance and repairs of utility systems shall be the same percentage as its share of the direct costs in respect of the use or consumption of the utility provided by the system to which the repair is made, as determined by the most recent joint engineering study referred to in Section 7.02 above, and with indices applied to direct costs as provided in Article VI(12) of the Joint Facility Agreement, as that provision may from time to time be amended. LIRR's share of the cost of such maintenance and repairs of building systems that do not supply a consumable utility on a regular basis (such as the fire alarm system) shall equal the percentage obtained by dividing the square footage of the LIRR Premises serviced by such system by the total square footage in Penn Station serviced by such system. Amtrak shall provide to LIRR monthly invoices of the charges provided for in this Section 7.03(a), which shall be issued concurrently with utility billings under the Joint Facility Agreement, and to which the provision of Article VI (14) of the Joint Facility Agreement, as that provision may be amended, shall apply.

(b) *Replacements and Modifications*. LIRR shall share in the capital costs of such replacements and modifications to the systems referred to in Section 7.01 above as are necessary to assure continuation of the level of service required by that

Section. LIRR's share of such capital costs shall be the same percentage as its share of ordinary repair costs of such system, as determined under subsection (a) of this Section 7.03 by the most recent engineering study prior to such replacement or modification. To the extent that LIRR determines it is necessary to modify the systems to provide utilities to the space currently leased to Mid-City Associates, and to the extent that such modifications do not also serve the Amtrak Premises, LIRR's share of the capital cost of such modifications shall be 100 percent. At the end of each month following the date on which such replacement or modification is placed in service, LIRR shall pay Amtrak a "monthly amount", determined by dividing the LIRR share of such capital costs by the number of months contained in the estimated useful life of the replacement or modification. LIRR shall also pay to Amtrak, on a monthly basis, interest on that portion of the LIRR share of such capital costs then outstanding. The interest rate shall be revised semi-annually, with the rate equal to the six month United States treasury bill rate in effect on the first day of the month preceding the date the rate is determined. LIRR's obligation to pay a "monthly amount," or monthly interest, shall be limited to the term of the Lease (or its renewal term if renewed by LIRR). Amtrak shall provide to LIRR monthly invoices of the above amounts, which shall be issued concurrently with billings under the Joint Facility Agreement and to which the provisions of Article VI (14) of the Joint Facility Agreement shall apply. Notwithstanding the provisions of this subsection or of Section 7.01 above, if during the Original Term (or the Renewal Term) of this Lease, LIRR notifies Amtrak that it intends to surrender the LIRR Premises prior to the end of such term, or to provide a separate utility system as permitted under Section 7.03(d) below, Amtrak shall thereafter have no obligation to make capital investments (as contrasted with ordinary maintenance and repairs) in order to assure continuation of the level of service required by Section 7.01. In that event, LIRR shall not be

obligated to share in any such capital investment that Amtrak thereafter voluntarily makes.

(c) *Disputes*. Notwithstanding the provisions of subsection (b) of this Section 7.03, LIRR may, but shall not be required to, share in the capital costs of any replacement or modification to a system referred to in Section 7.01 above if such replacement or modification is not necessary to maintain the level of service required by that Section. Disputes as to whether any replacement or modification is necessary or subject to sharing under this Section 7.03 shall be subject to arbitration under Article X below.

(d) *LIRR Alterations*. Nothing herein contained shall bar LIRR from carrying out, at its own expense, the installation, repair, replacement, alteration, or renewal of any utility system or subsystem within the LIRR Premises; provided, however, that any and all such actions shall be subject to the provisions of Article VI and Section 7.05 below.

Section 7.04. *Separate Metering by LIRR*. The parties hereto acknowledge that LIRR intends to install separate meters to measure electrical usage in the LIRR Premises. All work undertaken in connection with any such installation shall be subject to the provisions of Article VI above. Following the installation of separate electrical meters, LIRR shall be responsible for the direct payment (instead of payment to Amtrak) of all charges and expenses for usage of electricity in the LIRR Premises and shall continue to pay to Amtrak all charges for any other utilities not separately metered, as provided in Section 7.01 above.

Section 7.05. *Location of Utility Equipment*. Each of the parties may continue to occupy the utility equipment areas in the premises of the other, as shown on Exhibit C, without charge, for so long as such utility use is continued therein. Each party may also continue to occupy without charge, and for so long as such utility use continues therein, the areas in the premises of the other currently utilized for pipes, ducts

and conduits. Sections 12.02 and 12.03 give the parties certain rights with respect to the repair, renewal and replacement of the equipment, pipes, ducts, and conduits referred to in the foregoing two sentences, and this Section 7.05 is not intended to modify or limit the rights there set forth.

In connection with LIRR's plans to install or modify air conditioning and other utility systems within the LIRR Premises, or in connection with Amtrak's need to provide and maintain utility services throughout Penn Station, each party shall install utility equipment (including pipes, ducts and conduits) that is not covered by the first two sentences of this Section ("Additional Utility Equipment") within its own premises to the extent feasible, but may need to use certain areas outside of its premises for the placement of such Additional Utility Equipment. A party desiring to install such equipment outside its own premises shall locate such equipment so as to minimize interference with the other party's needs for space (1) for its own operations (or those of its derivative users) or (2) for future commercial development, and so that pipes and ducts shall generally be located in the air space above existing ceilings. Each party agrees to furnish the other party such space in mutually acceptable locations, provided that such space (i) does not have substantial potential for commercial development, and (ii) is not required by the other party for its own operations, and provided that the proposed installation will not substantially compromise the architectural integrity of the affected area. Such space shall be furnished rent-free, provided however, that if the parties agree, in any instance, that particular equipment should be located in an area that has substantial potential for commercial development or that may otherwise be required for the other party's operations, the party desiring to install the equipment must pay the other party the fair market rental value for such space. A party locating such equipment shall also reimburse the other party for any damage or additional cost resulting from the installation. Disputes as to whether a particular area has substantial commercial potential, or as to

an appropriate rental, shall be subject to arbitration under 10.01 below.

Section 7.06. *Force Majeure.* Performance of Amtrak's obligations under this Article VII shall be subject to interruptions attributable to force majeure.

ARTICLE VIII

CONCESSION AGREEMENTS

Section 8.01. *Concession Agreements.* Amtrak shall use its best efforts to obtain the consent (where such consent is necessary) of all tenants under leases of space and concession agreements currently in effect in whole or in part within the LIRR Premises (the "Concession Agreements") to an assignment to LIRR of any of Amtrak's interests in those Concession Agreements that relate to the LIRR Premises. Within sixty days after the Effective Date, Amtrak shall assign and convey to LIRR, by separate agreement, such interests in those Concession Agreements, such assignment to be effective as of the Effective Date, except where the consent of the tenant (if necessary) shall not have been obtained. The form of the assignment and the identity of the Concession Agreements that are in effect within the LIRR Premises are set forth in Exhibits D and E hereto, respectively. In any situation in which consent of the tenant is required and Amtrak is unable to obtain such consent, Amtrak agrees (1) to designate LIRR its agent for purposes of exercising the interests of the Lessor under the Concession Agreement to the extent those interests relate to the LIRR Premises, and (2) if a Concession Agreement relates only in part to the LIRR Premises, to negotiate an equitable division, as between Amtrak and LIRR, of the rents or other revenues payable to the Lessor under that Concession Agreement, effective as of the Effective Date hereof. Moreover, Amtrak agrees to consent to any action by LIRR to condemn any property within the LIRR Premises that is under

lease or subject to a concession agreement. LIRR shall indemnify and hold Amtrak harmless against and from any and all loss (including loss of revenues), damage and expense arising from or pertaining to such condemnation action or any action taken by LIRR as agent for the Lessor under a Concession Agreement; provided, however, that Amtrak shall have a duty to mitigate such loss, damage and expense. Any claim of injury under the preceding sentence, and any dispute with respect to an equitable division of rents or other revenues, shall be subject to arbitration under Section 10.01, provided that (1) wherever fifteen (15) days is provided for therein as a period within which to act, the period shall be five (5) days in lieu thereof, (2) in addition to satisfaction of the notice provision in Section 15.03 below, a copy of any notices initiating arbitration hereunder or responding thereto shall be provided to the Assistant Vice-President Real Estate in the case of Amtrak, and the MTA Director of Real Estate in the case of LIRR, and (3) the third arbitrator shall be a person experienced in the real estate field.

Section 8.02. *Indemnification Relating to Certain Concession Agreements*. Notwithstanding any other provision of this Agreement, Amtrak shall indemnify and hold LIRR harmless from and against any damages, costs, expenses, claims, suits, or proceedings arising out of a claim by Gourmet Management, Inc., The Horn & Hardart Company, or MSD Penn Station Shoe Repair under concession agreements involving any of those lessees (or their successors or assigns) that were entered into by Amtrak and assigned (in whole or in part) to LIRR pursuant to Section 8.01, provided that (1) the Title Policy obtained pursuant to Section 1.03 does not injure LIRR against such claim, (2) the claim asserted by such lessee is that its possession has been disturbed by an entity other than LIRR (or an entity that obtains its rights by, from or through LIRR) in violation of a warranty of quiet enjoyment made by Amtrak and contained in such concession agreement, and (3) LIRR has not had a right to terminate such agreement pursuant to the terms of the agreement and without cost to LIRR.

LIRR shall be obligated to mitigate any damages, costs, expenses or claims asserted against Amtrak. Such duty to mitigate shall include, but not be limited to, the exercise of any rights that LIRR may possess to recover from a party other than Amtrak whose actions have disturbed the possession of the lessee.

* * *

ARTICLE XII

QUIET ENJOYMENT; RIGHTS RESERVED; EASEMENTS

Section 12.01. *Covenants and Agreements of Amtrak.*

(a) Since 1966, LIRR has possessed certain rights under the Joint Facility Agreement to use and occupy most of the areas referred to in this Lease as the LIRR Premises. Those rights under the Joint Facility Agreement will be referred to as "Old Rights." As to those Old Rights, the covenant of quiet enjoyment contained in the Joint Facility Agreement shall continue in effect during the effectiveness of that Agreement, and the provision of Section 1.01 of this Lease making the demise subject to the state of title shall not affect those rights. The additional rights and easements that are granted to LIRR in this Lease (including all rights obtained by LIRR from Amtrak with respect to the West End Concourse) will be referred to as "New Rights." As to those New Rights, the provision of Section 1.01 of this Lease making the demise subject to the state of title as of the Effective Date (except as to matters set out in an Exhibit H to be added on the Effective Date) shall be applicable, and Amtrak covenants that, as long as LIRR shall pay the rental hereunder and shall observe and perform all of the covenants, terms, conditions, and agreements of this Lease to be observed or performed by LIRR, LIRR shall, during the Original Term and the Renewal Term, peacefully and quietly enjoy such New Rights without molestation or hindrance by Amtrak or its successors or

assigns; provided, however, that the exercise by Amtrak (or its successor or assign) of any right provided in this Lease shall not constitute a molestation or hindrance by it. The covenant set forth in the preceding sentence shall also extend to any Old Rights that are covered by this Lease, during any period of time that this Lease is in effect but the Joint Facility Agreement is not in effect. The rights provided to LIRR under Sections 6.04, 6.05, 8.01 and 8.02 shall constitute New Rights, but such designation shall not derogate from the rights expressly provided LIRR in such sections. Amtrak agrees that it shall not pledge, mortgage, or encumber the LIRR Premises unless such pledge, mortgage, or encumbrance shall be subject to this Lease.

(b) The covenant of quiet enjoyment contained in subsection (a) above is subject to any rights of the City of New York in and to the LIRR Premises pursuant to that certain Franchise Agreement dated October 9, 1902, as amended, by and between the Board of Rapid Transit Railroad Commissioners for the City of New York and Amtrak's predecessor in interest, the Pennsylvania, New York and Long Island Railway Company (the "Franchise"). Amtrak intends to comply with its obligations under the Franchise, but reserves full rights to contest and litigate any disputed issues arising under or in connection with the Franchise. During any period in which it is required to take some action pursuant to its obligations under the Franchise, Amtrak shall comply with such requirement. If Amtrak should discontinue or abandon intercity rail passenger service in the Franchise area (other than a temporary cessation of service) and if such discontinuance or abandonment would, in the absence of an assignment of portions of the Franchise to LIRR, adversely affect LIRR's quiet enjoyment of the LIRR Premises, then Amtrak shall, at LIRR's option, and subject to any required governmental approvals, assign to LIRR, without cost, such portions of the Franchise as may be necessary to assure LIRR's continued quiet enjoyment of the LIRR Premises during the Original Term and the Renewal Term.

Section 12.02. *Reservation of Rights by Amtrak.* Amtrak hereby reserves to itself and its transferees, successors, and assigns the following easements and rights in and to the LIRR Premises:

(i) A non-exclusive easement and right in Amtrak, its employees, contractors, passengers, and invitees, in common with the public, for ingress and egress to pass and repass in, over, through and across, and use and enjoyment of, all areas within the LIRR Premises that may, from time to time, be open to the public; such right shall be subject to the conditions under which such premises are open to the public and shall be exercised by means of such corridors, lobbies, public areas and pedestrian or vehicular ways, and by means of such elevators, escalators or other facilities for movement of persons or property as may from time to time be open to and used by the public.

(ii) All of Amtrak's right, title, and interest in and to all utility equipment, pipes, ducts, and conduits currently located within Penn Station, including the contents thereof, whether or not the same shall be located in whole or in part within the LIRR Premises, and an easement for the location and placement of all such currently located utility equipment, pipes, ducts, and conduits, and of utility equipment, pipes, ducts and conduits added by Amtrak in the future pursuant to Section 7.05 of this Lease.

(iii) A non-exclusive easement and right of access between the Amtrak Premises and the present subway entrances at Seventh and Eighth Avenues, as shown on Exhibit I (except through the West End Concourse), while they remain open, and to such substitute entrances, or entrances to substitute rapid transit facilities, as may be constructed in the future, insofar as the access to those entrances is controlled by LIRR, all subject to the

conditions upon which such entrances are open to the public.

(iv) Subject to the rights of LIRR pursuant to Article VI above, an easement and right of access in, over, under, across, and through the LIRR Premises to the extent necessary or desirable in order to use, operate, maintain, replace, repair, remove, add to, substitute, change, restore, renovate, or renew all structural elements, lines, poles, pipes, ducts, conduits, wiring, fixtures, appliances, building systems, and equipment located within Penn Station as of the Effective Date of this Lease, whether or not the same shall be located in whole or in part within the LIRR Premises, and utility equipment, pipes, ducts and conduits added by Amtrak in the future pursuant to Section 7.05 of this Lease.

(v) An easement and right in Amtrak, its employees, contractors, passengers, and invitees, in common with the public, for ingress and egress to pass and repass in, over, through and across, and use and enjoyment of, the platforms that are part of the LIRR Premises and the stairways and escalators listed on Exhibit A-4, such easement and right to be exercisable during any period when LIRR has ceased to provide rail service to Pennsylvania Station (other than a temporary cessation of service), subject to LIRR's rights under the Joint Facility Agreement. The easements and rights granted in this paragraph are not exclusive, but are not conditional upon use, or rights of use or an easement by or in persons or entities other than Amtrak, its employees, contractors, passengers or invitees.

All easements and rights reserved and retained in this Section 12.02 shall burden and run with the LIRR Premises, and shall be for the benefit of Amtrak, its successors, transferees, and assigns, and shall include the employees, agents,

licensees, and invitees of Amtrak, its successors, transferees, and assigns.

Section 12.03. *Grant of Easements to LIRR.* Amtrak hereby grants to LIRR, its successors, transferees and assigns, the following easements and rights in and to Penn Station:

(i) A non-exclusive easement and right in LIRR, its employees, contractors, passengers, and invitees, in common with the public, for ingress and egress to pass and repass in, over, through, and across, and use and enjoyment of, all areas within Penn Station that may, from time to time, be open to the public, including a right of ingress and egress between the LIRR Premises and the city streets outside of Penn Station; such right shall be subject to the conditions under which such premises are open to the public and shall be exercised by means of such corridors, lobbies, public areas and pedestrian or vehicular ways, and by means of such elevators, escalators or other facilities for movement of persons or property, as may from time to time be open to and used by the public.

(ii) An easement and right of access in, over, under, across, and through such portions of Penn Station as are necessary (but without limiting LIRR's rights pursuant to the third sentence of this paragraph), and an easement and right of access between the LIRR Premises and the city streets outside of Penn Station as are necessary (but without limiting LIRR's rights pursuant to the third sentence of this paragraph), in order that LIRR may exercise the rights granted hereunder and carry out its obligations hereunder; provided that such easements and rights shall not give LIRR any right to an enlargement of the level of access that exists on the Effective Date or any right to diminish the usable space within the Amtrak Premises. The easements and rights granted in this paragraph are not exclusive, but are not conditional upon use, rights of use, or an easement by or in persons or entities other

than LIRR, its employees, contractors, passengers, or invitees. Notwithstanding anything to the contrary contained in the Joint Facility Agreement relating to access to and from the LIRR Premises, during the term and renewal term of this Lease, Amtrak reserves the right to change the location of access points to and within Penn Station, except access locations that are within the LIRR Premises, but agrees that neither it nor its successors or assigns shall take any action or consent to any action (without the consent of LIRR) that has the effect of diminishing the level or utility of access that exists on the Effective Date. Exhibit I shows the present configuration of Penn Station; stairways, escalators and elevators within Penn Station are indicated, along with entrances at street level, exclusive of access locations wholly within the LIRR Premises and access locations within the jurisdiction of the New York City Transit Authority. The access locations indicated on Exhibit I and access between those locations and the public streets are intended to be covered by the title insurance obtained by LIRR. If Amtrak changes an access location, the title of the substitute access location, and of access between that location and the city streets at street level, shall not be such as to increase the risk that access may be terminated or impaired by reason of matters of title. Any dispute as to whether a proposed change of access location (or of access between such location and the city streets at street level) is consistent with the terms of this paragraph shall be subject to expedited arbitration pursuant to Section 10.02; provided, however, that an arbitration award approving such change against a challenge that the proposed substitute access location, or access between that location and the city streets at street level, is at increased risk of being terminated or impaired by reason of matters of title shall not foreclose LIRR from asserting a claim against Amtrak under this paragraph if access through such substitute access location is thereafter terminated or impaired by reason of the lesser quality of title of either the substitute access location or of access to the city streets through such location.

(iii) Subject to the rights of Amtrak pursuant to Article VI above, an easement and right of access in, over, under, across, and through Penn Station to the extent necessary or desirable in order to use, operate, maintain, replace, repair, remove, add to, substitute, change, restore, renovate, or renew all utility equipment, lines, poles, pipes, ducts, conduits, wiring, fixtures, appliances, and equipment owned or operated by LIRR and located within Penn Station as of the Effective Date of this Lease and utility equipment (including pipes, ducts and conduits) added by LIRR in the future pursuant to Section 7.05 of this Lease.

All easements and rights granted by this Section 12.03 shall be coterminous with this Lease, shall burden and run with the land, and shall be for the benefit of LIRR, its successors, transferees and assigns, and shall include the employees, agents, licensees, and invitees of LIRR, its successors, transferees and assigns.

Section 12.04. *Enforcement of Rights Under Lateral Support Agreement*. Amtrak agrees that it shall exercise such rights as it may possess to enforce the lateral support obligations contained in the Lateral Support Agreement dated March 18, 1970, between Penn Central Transportation Company, Bowery Savings Bank and Mid-City Associates, recorded on April 24, 1970 in the Office of the Register of New York County (the "Register") in Reel 171, pg. 1704, as amended on July 8, 1970 and recorded in the Register on July 14, 1970 in Reel 178, pg. 1417, to the extent that a failure to enforce such obligations could adversely affect the LIRR Premises.

Section 12.05. *Access Through the Mid-City Associates Lease Area*. Amtrak hereby grants a non-exclusive easement

to LIRR coextensive with Amtrak's right to use a passageway or other accessway starting at the northern line of 33rd Street and ending at the southerly line of 34th Street between Seventh and Eighth Avenues deriving from an agreement dated March 13, 1927 from the Stuyvesant Real Estate Company and Hotels Company, Inc. to Pennsylvania Tunnel and Terminal Railroad Company, or otherwise derived from a predecessor agreement to the 1927 agreement, or from any other agreement (the "Predecessor Easement"). Such Predecessor Easement, indicated on Exhibit J, has been superseded by a substituted access area pursuant to paragraphs 6 and 36 of a lease between Penn Central Company and Mid-City Associates dated November 21, 1968, which lease is being assigned by Amtrak to LIRR effective as of the Effective Date hereof. LIRR shall not diminish Amtrak's level of access, as it exists as of the Effective Date, through the Mid-City Associates leased area while the Mid-City Associates Lease is in effect. During any period when the Mid-City Associates Lease is not in effect, LIRR shall afford Amtrak access through the Franchise area at a level which is no less than the lesser of (a) the level of access effective on the Effective Date, and (b) the greater of (1) a level of access consistent with the existence and continuation of the Predecessor Easement, and LIRR's joint use thereof and (2) the actual access afforded by abutting owners without cost to LIRR, which LIRR shall not reduce or unreasonably refuse. The rights granted by Amtrak under this paragraph and the obligations imposed upon LIRR are subject to the Franchise, as referred to in Section 12.01(b) herein. Nothing herein is intended to waive any right of LIRR under the Joint Facility Agreement.

ARTICLE XIII

LIABILITY; CASUALTY; CONDEMNATION

Section 13.01. *Liability.*

(a) Subject to Section 13.01(d), all liability for personal injury and property damage occurring within the LIRR Premises (including the portions of platforms and the escalators, elevators, and stairways that are within the LIRR Premises) shall be borne entirely by LIRR.

(b) Subject to Section 13.01(d), all liability for personal injury and property damage occurring on Level B or in Zone 1, other than within the LIRR Premises, shall be borne entirely by Amtrak.

(c) Subject to Section 13.01(d), each party shall be responsible for, and shall defend, settle, and/or satisfy all claims arising from or pertaining to personal injury and property damage, the liability for which has been allocated to it by the provisions of paragraphs (a) or (b) of this Section 13.01, and shall indemnify and hold harmless the other party (including officers, agents, employees, and subsidiaries of the other party) against and from any and all loss, damage and expense arising from or pertaining to such claims, irrespective of any negligence or fault of such other party (or of its officers, agents, employees, or subsidiaries). The provisions of this Section 13.01 are not intended to, and shall not, confer benefits upon any person not a party to this Lease. The provisions of this Section 13.01 are not intended to, nor shall they, affect in any manner the obligations of Amtrak or LIRR hereunder in respect of damage to Penn Station caused by fire or other casualty. All such obligations, including any obligation to restore or rebuild, shall be governed by Section 13.02 below.

(d) The foregoing paragraphs (a) through (c) shall not make either Amtrak or LIRR liable for personal injury or property damage, or claims arising from such personal injury

or property damage (including claims for punitive damages), where the personal injury or property damage results from the gross negligence or willful or wanton misconduct of the other (including its officers, agents, employees and subsidiaries).

Section 13.02. *Casualty Loss or Damage.*

(a) In the event of damage to or destruction of the LIRR Premises or any part thereof, by fire or otherwise, that would affect the use of the Amtrak Premises by Amtrak, its passengers, or employees, LIRR shall promptly give written notice thereof to Amtrak, and LIRR shall, at LIRR's sole cost and expense, cause the same to be restored, repaired, replaced, rebuilt, or altered in a manner that will, as nearly as possible, eliminate such adverse effect on the use of the Amtrak Premises by Amtrak, its passengers, or employees, and that will, as nearly as possible, assure that the portions of the LIRR Premises used by Amtrak, its passengers, or employees will be of a condition and quality equivalent to that provided prior to the casualty loss. Any changes or alterations shall be subject to the provisions of Article VI above. Such restorations, repairs, replacements, rebuilding, or alterations shall be commenced as promptly as possible in the circumstances, taking intro account any delays due to adjustment of insurance, preparation of plans and specifications, and applications for necessary licenses or permits, and shall thereafter be prosecuted with diligence. No compensation or reduction or abatement of rent shall be paid or allowed by Amtrak by reason of such damage or destruction.

(b) In the event of damage to or destruction of any portion of the Amtrak Premises, by fire or otherwise, that would affect the use by LIRR, its passengers, or employees of the LIRR Premises, Amtrak shall promptly give written notice thereof to LIRR, and Amtrak shall, at Amtrak's sole cost and expense, cause the same to be restored, repaired, replaced, rebuilt, or altered in a manner that will, as nearly as possible, eliminate such adverse effect on the use of the LIRR Premises

by LIRR, its passengers, or employees, and that will, as nearly as possible, assure that the portions of the Amtrak Premises used by LIRR, its passengers, or employees will be of a condition and quality equivalent to that provided prior to the casualty loss. Any changes or alterations shall be subject to the provisions of Article VI above. Such restorations, repairs, replacements, rebuilding, or alteration shall be commenced as promptly as possible in the circumstances, taking into account any delays due to adjustment of insurance, preparation of plans and specifications, and applications for necessary licenses or permits, and shall thereafter be prosecuted with diligence. No compensation or reduction or abatement of rent shall be paid or allowed by Amtrak by reason of such damage or destruction.

Section 13.03. *Condemnation.* If the whole of the LIRR Premises shall be taken or condemned by any governmental or quasi-governmental authority for any public or quasi-public use or purpose, then the term of this Lease shall cease and terminate as of the date when title vests in such governmental or quasi-governmental authority. If less than the entire LIRR Premises is taken or condemned by any governmental or quasi-governmental authority for any public or quasi-public use or purpose, then the term of this Lease shall cease and terminate with respect to any portion of the LIRR Premises so taken or condemned as of the date when title vests in such governmental or quasi-governmental authority, and the Lease shall otherwise continue in full force and effect. If all or any portion of the LIRR Premises is taken or condemned by any governmental or quasi-governmental authority, LIRR shall be entitled to seek a separate award for the value of its leasehold interest in any portion of the LIRR Premises that is so taken or condemned.

ARTICLE XIV

SURRENDER

Section 14.01. *Surrender of LIRR Premises.* Anything herein to the contrary notwithstanding, LIRR may surrender the LIRR Premises at any time during the term of this Lease; provided (a) that it has notified Amtrak in writing of its intent to surrender not less than one calendar year prior to the date on which such surrender becomes effective; (b) that at the time of such surrender the LIRR Premises shall be returned to Amtrak in substantially its present state of repair, reasonable wear and tear excepted, subject to LIRR's rights under the Joint Facility Agreement, if any, and to Sections 5.02 and 13.02(a); and (c) that irrespective of such surrender, LIRR shall remain liable for all its obligations and liabilities under this Lease that accrue prior to the date of such surrender, subject to the last sentence of Section 7.03(b) above. Upon such surrender, the Lease shall be terminated.

* * *

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of the date first above written.

ATTEST:	NATIONAL RAILROAD PASSENGER CORPORATION
/s/ [ILLEGIBLE]	By: /s/ [ILLEGIBLE]
[Corporate Seal]	
ATTEST:	THE LONG ISLAND RAIL ROAD COMPANY
/s/ [ILLEGIBLE]	By: /s/ [ILLEGIBLE]
[Corporate Seal]	

* * *

AMTRAK SPACE INSIDE LIRR PREMISES ON LEVEL A

SPACE	*AREA (S.F.)*
TICKET RECEIVERS AND MEDICAL FACILITIES	4,900
MAINTENANCE OF EQUIPMENT WELFARE	900
PUBLIC TOILETS	2,600

LIRR SPACE OUTSIDE LIRR PREMISES ON LEVEL A

SPACE	*AREA (S.F.)*
TRAINMAN'S WELFARE	2,550
TICKET RECEIVERS	1,950
USHERS LOCKER ROOM	1,100

* * *

EXHIBIT D

TERMS OF ASSIGNMENT
OF
CONCESSION AGREEMENTS

Section 1.01. Concession Agreements to be Wholly Assigned. Within sixty days after the Effective Date, Amtrak shall assign and convey to LIRR, effective as of the Effective Date, all of its right, title and interest in each of the leases, licenses, permits, and other agreements ("Concession Agreements") identified in Part I of Exhibit E of this Lease. (Lease numbers in the Exhibit are the Amtrak file numbers of the Concession Agreements.)

Section 1.02. Concession Agreements to be Assigned in Part. The Concession Agreements identified in Part II of Exhibit E pertain to premises located both within and outside of the LIRR Premises. Amtrak shall use its best efforts to obtain from the lessee, licensee, permittee, contractor or concessionaire ("Tenant") under each such Concession Agreement two new concession agreements to substitute for the existing Concession Agreement, each such successor agreement to contain terms identical to the terms of the existing Concession Agreement, except as to the space or locations covered, and as to rentals and other income payable by the Tenant. Of any two such successor concession agreements substituting for one Concession Agreement, one shall cover the space or locations within the LIRR Premises and one shall cover the space or locations outside the LIRR Premises. Revenues and other income provided for in any such existing Concession Agreement shall be equitably allocated between the successor concession agreements, as agreed to by the parties to this Lease or by arbitration as provided in Section 8.01 of this Lease. Any other provision in an existing Concession Agreement which by its nature is not susceptible to identical reproduction in both successor concession agreements shall

be disposed of as agreed to by the parties to this Lease or by arbitration as provided in Section 8.01 of this Lease.

Upon execution of any such successor concession agreements, Amtrak shall assign to LIRR, effective as of the Effective Date hereof, all of its right, title and interest in any successor concession agreement which covers space or locations within the LIRR Premises.

Amtrak shall exercise best efforts under this section within a 60-day period after the Effective Date of this Lease to conclude such agreements, and LIRR shall cooperate with Amtrak in those efforts. With respect to any Concession Agreement as to which Tenant shall not have consented to the substitution of two successor concession agreements within sixty days after the Effective Date of this Lease, Amtrak hereby designates LIRR its agent for purposes of exercising the interests of the lessor or licensor under such Concession Agreement but only to the extent those interests relate to rights granted in the LIRR Premises, effective as of the Effective Date of the Lease, as provided in Section 8.01 of the Lease, and Amtrak and LIRR shall agree within said 60-day period to an equitable division, as between Amtrak and LIRR, of the rents or other income payable to Amtrak under that Concession Agreement, as provided in Section 8.01 of the Lease, and subject to arbitration as provided for therein if the parties are unable to agree on the terms of such agency and division. Except as otherwise provided in this Section 1.02, no such Concession Agreement shall be amended without the consent of LIRR to the extent such amendment affects the LIRR Premises.

Section 1.03. Winston Network Agreement. With respect to the Concession Agreement which is a license agreement dated as of December 1, 1985, between Amtrak and Winston Network, Inc. ("Winston"), the parties hereto shall agree upon the ownership of inventory of advertising signs and similar material as between Amtrak and Winston, and upon such identification, which shall be made within sixty days of the

Effective Date hereof, Amtrak shall convey to LIRR the inventory within the LIRR premises which it owns, if any, together with its certification of such prior ownership. Amtrak shall take such action as necessary to remove such advertising signs from coverage by its agreement with Winston.

Section 1.04. New York Telephone. With respect to the Concession Agreement which is the Service Agreement dated August 30, 1967, between the Pennsylvania Tunnel and Terminal Railroad Company, predecessor in interest to Amtrak, and the New York Telephone Company (Lease No. 31-01-008), the provisions of Section 1.02 shall apply. The allocation of rentals in the successor agreements thereunder shall be made in accordance with applicable tariffs and upon the basis of the revenues derived from the coin-operated telephones located within the LIRR Premises on the one hand and the revenues derived from such telephones outside the LIRR Premises on the other hand. Locations shall be determined on the basis of a physical inventory.

Section 1.05. Mid-City Associates Lease. With respect to that Concession Agreement which is the Agreement of Lease between the Penn Central Company (predecessor in title and interest to Amtrak) and Mid-City Associates dated as of November 21, 1968, as amended ("Mid-City Lease"), Amtrak shall use its best efforts to enter into two substitute concession agreements as provided in Section 1.02 hereof, except that one such agreement ("Agreement A") shall cover garage space on other than the Concourse Level (Level A) referred to in the Fourth Modification Agreement to the Mid-City Lease and storage space on other than the Concourse Level (Level A), as referred to in Section 4(b) of said Lease; the other such substitute Agreement ("Agreement B") shall cover the remainder of the premises demised in the Mid-City Lease, including the Access Area referred to under Section 36 of the Mid-City Lease. Agreement B shall provide for the inclusion of all the rent and other revenues from the Demised Premises and from the Income Producing Areas, both as defined in the

Mid-City Lease. Amtrak shall assign Agreement B to LIRR upon execution, to be effective as of the Effective Date. If, Amtrak having used its best efforts for a period of sixty days after the Effective Date, substitute concession agreements are not entered into, Amtrak shall thereupon assign the Mid-City Lease in its entirety to LIRR, effective as of the Effective Date, and LIRR shall (1) use its best efforts to negotiate successor concession agreements with the lessee under the Mid-City Lease, one to cover the same space as Agreement A and one to cover the same space as Agreement B, and shall assign Agreement A to Amtrak effective as of the Effective Date hereon, and (2) if, LIRR having used its best efforts for a period of sixty days, substitute concession agreements are not entered into, LIRR shall at the end of that period designate Amtrak its agent for purposes of exercising the interests of the lessor in the Mid-City Lease, but only to the extent of what would have been included in Agreement A. LIRR shall afford Amtrak access through the Access Area to the same extent as provided in Section 12.02(i) of the Lease. The parties shall cooperate with each other's efforts to obtain substitute concession agreements under this Section. Except as otherwise provided in this Section, the Mid-City Lease shall not be amended without Amtrak's consent to the extent such amendment affects the space to be covered by Agreement A.

Section 1.06. Gourmet Management, Inc. and Two Operating, Inc. (a) The parties are negotiating separate agreements with Gourmet Management, Inc. ("Gourmet") that contemplate severance of Gourmet's lease dated December 21, 1979 (the "GM Lease"), on terms satisfactory to the parties and to Gourmet. The parties will continue to use their best efforts to achieve such a severance and also to obtain a severance with respect to a lease held by Gourmet's affiliate, Two Operating, Inc. and dated November 5, 1969. In the event that the parties fail to obtain a severance of the GM Lease on or before the Effective Date of this Lease, then Section 1.02, as supplemented by subsections (b) and (c), below, shall apply to this assignment of the lease to LIRR.

(b) From and after the Effective Date, the parties will share all rents payable under the GM Lease in proportion to the square footage that Gourmet occupies within and without the LIRR Premises under the GM Lease.

(c) LIRR believes that as of the Effective Date hereof, Gourmet is in violation of the use and subletting clauses in Paragraphs THIRD and SIXTH of the GM Lease and is accordingly in default thereunder. Amtrak agrees that on and after the Effective Date, it shall not, without the consent of LIRR, execute any written waiver (as contemplated in Paragraph EIGHTEEN of the GM Lease) of the provisions of Paragraphs THIRD and SIXTH as they relate to the LIRR Premises, or of any other provision of the GM Lease insofar as it relates to the LIRR Premises, or of any provision of any successor lease with Gourmet relating to the LIRR Premises, nor shall it take, permit, or omit any action that it knows would have the same effect as such a written waiver, nor shall it take, permit, or omit any action that it knows or should know would have the same effect as a written waiver of the provisions of Paragraphs Third and Sixth as they relate to the LIRR Premises, or of any use or subletting provision of a successor lease relating to the LIRR Premises. Amtrak shall furnish LIRR with copies of any written communications it makes to Gourmet or its sub tenants regarding Paragraphs THIRD and SIXTH of the GM Lease or any use or subletting provisions of a successor lease relating to the LIRR Premises. Except with the consent of Amtrak, LIRR shall neither take, nor secure the performance of, any action that disturbs Gourmet's use or occupancy of space outside the LIRR Premises. Without limitation on the scope of the foregoing, in the event LIRR commences eviction proceedings against Gourmet, those proceedings shall relate only to Gourmet space within the LIRR Premises, and LIRR specifically agrees that it will not seek to enforce any judgment, writ or other process issued in any such eviction proceeding, except with the consent of Amtrak, to the extent that such enforcement would disturb Gourmet's use or occupancy of space outside the LIRR Premises.

Section 1.07. B.F. Bar, Inc. In the case of B.F. Bar, Inc., the parties agree that for purposes of either a severance of B.F. Bar's lease dated October 24, 1975 (the "B.F. Bar Lease"), or an assignment or a successor agreement relating to the LIRR Premises under Section 1.02, they will share the rent payable under the B.F. Bar Lease in proportion to the square footage that B.F. Bar occupies within and without the LIRR Premises under the lease.

Section 1.08. Flowerama. Amtrak shall assign to LIRR the entire leasehold agreement dated February 5, 1975, between Penn Central Transportation Company and Flowerama, Inc., effective as of the Effective Date, unless it has previously terminated the Flowerama agreement. If Amtrak assigns the Flowerama agreement to LIRR, LIRR shall terminate such agreement, currently a month-to-month tenancy, as soon as possible after the Effective Date. Rent paid by Flowerama after the Effective Date shall be shared by the parties in proportion to the square footage that Flowerama occupies within and without the LIRR Premises.

Section 1.09. Covenants to Perform Obligations. LIRR hereby assumes and agrees to perform all of the covenants and obligations placed on the lessor under the provisions of the Concession Agreements assigned to it pursuant to Section 1.01 hereof, and of the successor concession agreements assigned to it pursuant to Section 1.02 hereof. Amtrak and LIRR each agree to perform the covenants and obligations of the lessor which each retains or accepts under those Concession Agreements as to which the Tenant has refused to enter into successor concession agreements. LIRR's obligations under this paragraph shall be effective with the Effective Date of the Lease.

Section 1.10. No Other Concession Agreements. Amtrak hereby covenants that the Concession Agreements listed in Parts I and II of Exhibit E are all of the Concession Agreements which grant rights in the LIRR Premises to which it is a party or a successor in interest to a party.

In the event there exist additional Concession Agreements that grant rights in the LIRR Premises which Amtrak is a party to, such Agreements shall be disposed of pursuant to the provisions of Section 1.01 or 1.02, whichever is applicable. In the event that as of the Effective Date hereof, there are persons or entities other than persons or entities claiming to be subtenants or assignees of a Tenant occupying space in the LIRR Premises without authorization from Amtrak (if such authorization is required), at the request of LIRR, Amtrak and LIRR shall act jointly to evict or remove such person or entity from occupancy. LIRR shall be entitled to an accounting, at Amtrak's expense, for all rental payments or other income accruing after the Effective Date allocable to such Concession Agreement or unauthorized occupancy. Any such amount received by Amtrak shall be deemed to be held in trust for the benefit of LIRR, and shall, upon request, be immediately paid over to LIRR. Any disagreement as to the allocation of such rental shall be disposed of in accordance with Section 8.01 of the Lease. Notwithstanding the provisions of Article IV of this Exhibit, Amtrak agrees to indemnify LIRR in an amount of one-half of any costs or expenses, including reasonable attorney's fees, incurred by LIRR in connection with the eviction or removal of any unauthorized occupant (other than persons or entities claiming to be subtenants or assignees of a Tenant).

ARTICLE II
INSTRUMENTS OF TRANSFER

Section 2.01. Estoppel Certificate, Tenant. On or before the Effective Date, Amtrak shall, without charge, require each of the Tenants under any Concession Agreements listed in Exhibit E to execute and deliver to LIRR a written estoppel certificate if such Concession Agreement provides for the execution and delivery of such certificate, and shall use its best efforts to cause such execution and delivery if the Concession Agreement does not so require. Such certificate shall

certify that the Concession Agreement is unmodified and in full force and effect (or if there have been modifications that the same is in full force and effect as modified and stating the modifications) and the dates to which the rent and any other amounts due under such Concession Agreement from Tenant have been paid in advance, if any, and stating whether or not to the best knowledge of Tenant, Amtrak (or other party) is in default in performance of any covenant, agreement, or condition contained in the Concession Agreement, and if so, identifying each such default of which the Tenant may have knowledge.

Section 2.02. Estoppel Certificate, Amtrak. On or before the Effective Date, Amtrak shall, without charge, execute, acknowledge, and deliver to LIRR a written estoppel certificate with respect to each of the following Concession Agreements listed in Exhibit E to the Lease: Lease No. 31-01-015 (Horn & Hardart Company); Lease No. 31-01-055 (The Bowery Savings Bank); Lease No. 31-01-004 (MSD Penn Station Shoe Repair); Lease No. 31-01-089 (B. F. Bar, Inc.); Lease No. 31-01-058 (Mid-City Associates); and Lease No. 31-01-066 (Two Operating Company). Each such certificate shall certify that the Concession Agreement is unmodified and in full force and effect (or if there have been modifications that the same is in full force and effect as modified and stating the modifications) and the dates to which the rent and other amounts, including security deposits, due under such Concession Agreement from Tenant have been paid in advance, if any, and stating whether or not to the best knowledge of Amtrak, Tenant is in default in performance of any covenant, agreement, or condition contained in such Concession Agreement, and, if so, identifying each such default of which Amtrak may have knowledge.

The failure of Amtrak to execute, acknowledge and deliver to LIRR a written estoppel certificate with respect to any Concession Agreement listed in this Section 2.02 shall constitute a covenant by Amtrak that the Concession Agreement

is unmodified and in full force and effect, that no rent or other amounts attributable to the period after the Effective Date have been paid before the Effective Date, that all security deposits have been paid and that Tenant is not in default in the performance of any covenant, agreement, or condition contained in such Concession Agreement.

Section 2.03. Documentation of Assignments and Agencies. (a) Upon the reasonable request of LIRR, Amtrak shall execute and deliver to LIRR such further documents and take such other action as may be necessary or appropriate to confirm the assignment, conveyance and delivery of the Concession Agreements listed in Part I of Exhibit E or of any successor agreements to the Agreements listed in Part II of Exhibit E which relate to the LIRR Premises and are retained by Amtrak under Section 1.02, or to vest in LIRR all of Amtrak's right, title and interest therein in accordance with the provisions hereof. Unless otherwise agreed, assignments of the agreements referred to in this subsection shall be in the following form: "The National Railroad Passenger Corporation hereby assigns and conveys its interest in the within (lease, license, agreement) between (itself, Pennsylvania Railroad, other) and (lessee, licensee, contractor) relating to certain space of A level of Penn Station, to the Long Island Rail Road, effective as of (Effective Date of Lease) for the remainder of the term of said (lease, license, agreement), which (lease, license, agreement) was entered into on (date)."

(b) As to any Concession Agreement (other than the Mid-City Lease) listed in Part II of Exhibit E as to which Amtrak does not obtain a successor agreement relating only to the LIRR Premises, upon the reasonable request of LIRR, Amtrak shall, within sixty (60) days of the Effective Date, issue a designation to LIRR in the following form:

> The National Railroad Passenger Corporation hereby designates the Long Island Rail Road its agent for purposes of exercising the interests of the lessor or licensor in the within (lease, license, agreement) between (itself, Pennsylvania Railroad, other) and (lessee, licensee, contractor) to the extent those interests relate to the LIRR Premises as defined in the Level A and Platform Lease dated _____, which designation shall be effective as of (Effective Date of Lease) for the remainder of the term of said (lease, license, agreement) entered into on (date).

If Amtrak does not obtain the successor agreements to the Mid-City Lease specified in section 1.05, it shall assign the entire lease to LIRR in the form of assignment contained in subsection (a) of this section.

(c) In the event that the Mid-City Lease is assigned to LIRR in its entirety and LIRR thereafter obtains the successor agreements specified in Section 1.05, LIRR shall, upon the reasonable request of Amtrak, assign Agreement A to Amtrak in substantially the form of assignment contained in subsection (a) of this section. If LIRR does not obtain the successor agreements specified in section 1.05, it shall, upon the reasonable request of Amtrak, issue a designation to Amtrak with respect to the space covered by Agreement A, in substantially the form of designation contained in subsection (b) of this section.

ARTICLE III
APPORTIONMENT OF RENTS

Section 3.01. Adjustments. Except as otherwise provided herein, in the event that the Effective Date does not fall on the first or last day of the accounting period used to determine any rental payments based on a percentage of gross receipts or pursuant to any other formula under any of the Concession Agreements listed in Part I of Exhibit E, LIRR shall pay to Amtrak in respect of each such Concession Agreement an amount equal to the entire rent paid to LIRR by the tenant under each such Concession Agreement in respect of the accounting period during which the assignment of the affected

Concession Agreement becomes effective hereunder, multiplied by a fraction, the numerator of which shall be the number of days in the relevant accounting period immediately preceding the Effective Date, and the denominator of which shall be the total number of days in the relevant accounting period. Any prepaid rents applicable to such accounting period shall be allocated in a similar manner as of the Effective Date and the applicable amounts shall be paid by Amtrak to LIRR at such date. The procedure provided for above for the allocation of rents made necessary by the occurrence of the Effective Date other than at the beginning or end of an accounting period shall also apply to the Concession Agreements listed in Part II of Exhibit E, provided, however, that the equitable allocation of rental formula determined under paragraph 1.02 shall be first applied to determine the correct amounts to be paid in adjustment.

Section 3.02. Amtrak hereby agrees to pay LIRR on the Effective Date all sums paid to Amtrak as security deposits and prepaid rent in the nature of security deposits or not otherwise contemplated by Section 3.01 above under the Concession Agreements listed in Part I of Exhibit E and assigned pursuant to this Agreement. In consideration of such payment, LIRR does hereby, for itself and its successors and assigns, assume and agree to hold said amounts for the benefit of the respective Tenants according to the terms of the respective Concession Agreements, thereby releasing Amtrak of any and all liability for the return of the security deposits and prepaid rent. In the case of Concession Agreements listed under Part II, security deposits and other prepaid amounts shall be allocated between the parties hereto on the basis of the allocation formula developed pursuant to Section 1.02.

Section 3.03. It is expressly agreed that nothing contained herein shall be deemed to create any liability on the part of LIRR for any rents due and payable under any Concession Agreement in respect of any period prior to the Effective Date, except as set forth in Section 3.01. Nothing shall preclude Amtrak from pursuing against any Tenant any remedy for damages relating to a cause of action arising prior to the Effective Date hereof out of a Concession Agreement which has been assigned to LIRR.

ARTICLE IV
INDEMNIFICATION

Except as hereinbelow provided, Amtrak shall indemnify LIRR against all liability accruing against the lessor under the Concession Agreements listed in Exhibit E arising prior to the Effective Date, and LIRR shall indemnify Amtrak against all liability accruing against the lessor under such Concession Agreements upon and after the Effective Date. If, after the Effective Date, (i) Amtrak takes any action on its own, or if LIRR takes such action at the request of Amtrak, in order to enforce any of Amtrak's rights as lessor under the Concession Agreements referred to in Sections 1.02 (which are not severed), Amtrak shali indemnify LIRR against all liability arising as a result of such action, or (ii) if LIRR takes any action on its own, or if Amtrak takes such action at the request of LIRR, in order to enforce any of the LIRR's rights as agent of lessor under such Concession Agreements, LIRR shall indemnify Amtrak against all liability arising as a result of such action; provided, however, that each party shall remain wholly liable for its own gross negligence or willful misconduct in acting on behalf of the other party.

* * *

SEVENTH AVENUE SUBWAY ACCESS WIDENING

This project is being undertaken to improve passenger access to the Seventh Avenue Subway from the LIRR Level A Concourse. The work consists of: Demolition of concession space; lighting and electrical work; painting; architectural treatment; and signage.

CENTRAL CORRIDOR

A new corridor located in the general area contained between column lines 16 through 18 and extending from the Interconnecting Corridor to the Hilton Passageway. Stairways and/or escalators will provide access to Platforms 7, 8, 9, 10, and 11. New elevators will be installed to provide access from Level A to Platforms 7 through 11 inclusive, for elderly and disabled passengers. The work consists of: Metal fabrication; fascia and architectural treatments; lighting and electrical work; signage; painting; and HVAC.

CONNECTING CONCOURSE

This project will provide for the widening of the concourse to improve passenger circulation from the LIRR Concourse area to the Seventh and Eighth Avenue subways. The work consists of: Demolition of concession space and superficial structural members; metal fabrication; fascia and architectural treatments; lighting and electrical work; painting; signage; and HVAC.

PLATFORM LEVEL VENTILATION

This project will vastly improve air circulation at platform level, removing excess heat generated by high performance rail cars and locomotives. The work consists

of: Metal fabrication; installation of ventilation ducts and machinery; electrical work; and demolition of unused conduit, piping and wiring.

MAIN CONCOURSE AREA

This project will provide for the widening of the Main Concourse Area leading to Platforms 7 through 11. The work consists of: Demolition of concession and office spaces; removal of unused structural members; architectural treatments; painting, signage, lighting and electrical work; and HVAC.

EAST END CONCOURSE AREA

This project will provide for additional LIRR Concourse Access to Platforms 9, 10, and 11, as well as improved passenger access to the Seventh Avenue Subway. The work consists of: Demolition of concession and office spaces; metal fabrication; fascia and architectural treatment; lighting and electrical work; painting; signage; and HVAC.

EXIT CONCOURSE AREA

This project will provide for new and refurbished escalators and stairs from Platform to Level A, refurbished toilets, new architectural finishes, changeable sign, air conditioning and public address systems. Structural modifications are included which will allow installation of AFC barriers without major passenger congestion.

1. Remove stairway and install escalator B level to Platform #8.
2. Refurbish escalator wells and construct pipe ballustrades with glass enclosures at concourse level and masonry and glass enclosures at platform level for escalators #7 and #8.
3. Construct handicap elevator in Taxi Court to B level, machine room on Platform #7.
4. Remove stairway to A level, mechanical equipment room and public lockers.
5. Remove escalators B to A level, located between Platforms #7 and #8.
6. Install new or refurbish stairways B to A level and A level to Platforms #7 and #8. Modify Amtrak ticket receiving office as impacted by corridors for stairways to Platforms #7 and #8, and modify medical and personnel facilities as impacted by stairway from B level to Platform #7.
7. Remove main concourse stairway to A level and construct two pair of vertical access facilities to A level. The north pair (vicinity Platform #7) consists of one stairway and one escalator.
8. Remove existing passenger elevator from A level to Platform #7.

* * *

PLAINTIFF'S EXHIBIT 82

PENNSYLVANIA STATION NEW YORK

JOINT FACILITY AGREEMENT

Between

NATIONAL RAILROAD PASSENGER CORPORATION
400 North Capital Street, N.W.
Washington, D.C. 20001

and

LONG ISLAND RAIL ROAD COMPANY
Jamaica Station
Jamaica, New York 11435

August 5, 1988

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EXHIBIT A	Zones 1 and 1a Existing Floor Plan—Schematic
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JOINT FACILITY AGREEMENT

THIS AMENDED AND RESTATED AGREEMENT (the "Agreement"), made as of this 5th day of August, 1988, by and between the National Railroad Passenger Corporation, a District of Columbia corporation whose principal place of business is situated at 400 North Capitol Street, N.W., Washington, D.C. 20001 ("Amtrak") and the Long Island Rail Road Company, a public benefit corporation of the State of New York whose principal place of business is situated at Jamaica Station, Jamaica, New York 11435 ("LIRR").

WITNESSETH:

WHEREAS, Amtrak is the owner and operator of a rail road passenger station located in the County, City, and State of New York and known as Pennsylvania Station ("Penn Station"), together with the railroad approaches thereto extending from Tenth Avenue in said County to a connection with the lines of LIRR in the County of Queens, City and State of New York, all such property being a part of that certain property conveyed by Consolidated Rail Corporation to Amtrak by deed effective as of April 1, 1976; and

WHEREAS, LIRR has heretofore utilized Penn Station pursuant to the terms of that certain Agreement dated January 20, 1966, as amended, by and between LIRR and Amtrak's predecessor in title and interest, the Pennsylvania Railroad Company (the "1966 Agreement"); and

WHEREAS, Amtrak, LIRR, and the Metropolitan Transportation Authority ("MTA") are this date entering into a certain Joint Venture Agreement (the "Joint Venture Agreement") for the purpose of jointly designing, constructing, and operating a modern system for the centralized control of train movements within Penn Station and certain railroad approaches thereto, which system will include the Joint Improvements

and the Solely Owned Improvements, as those terms are defined in the Joint Venture Agreement; and

WHEREAS, it is the intent of the parties hereto that the Joint Venture Agreement, during the term thereof, shall govern the rights and obligations of the parties hereto with respect to the Joint Improvements and the Solely Owned Improvements; and

WHEREAS, Amtrak and LIRR are this date entering into a certain lease entitled the Level A and Platform Lease (hereafter referred to as the "Level A Lease"), whereby Amtrak is leasing to LIRR a portion of Zone 1, as defined below, at Penn Station, as well as certain other premises situated outside Zone 1, all as described in the Level A Lease (the "LIRR Premises"); and

WHEREAS, it is the intent of the parties that, except as otherwise specifically provided herein or in the Level A Lease, the Level A Lease, during the term thereof, shall govern the rights and obligations of the parties hereto with respect to the LIRR Premises; and

WHEREAS, Amtrak and LIRR have entered into a lease agreement dated January 30, 1985, whereby Amtrak has leased to LIRR certain land and attendant trackage known as Yard B and more specifically described below (the "Yard B Lease"); and

WHEREAS, the Joint Venture Agreement, the Level A Lease, and the Yard B Lease will, during their respective terms, alter certain relations between the parties under the 1966 Agreement; and

WHEREAS, Amtrak and LIRR wish to amend and restate the 1966 Agreement and to render it consistent with the Joint Venture Agreement, the Level A Lease, and the Yard B Lease;

WHEREAS, pursuant to the New York Pennsylvania Station Cooperative Agreement entered into among the Federal Railroad Administration (FRA), MTA and Amtrak, effective

May 25, 1983, MTA and FRA financed and MTA constructed the West End Concourse, and title thereto vested in Amtrak; and the parties hereto now intend that the 1966 Agreement be amended to include the West End Concourse in Zone 1a;

NOW, THEREFORE, in consideration of the foregoing, of the mutual promises, covenants, and agreements of the parties herein contained, and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Amtrak and LIRR hereby mutually agree as follows:

ARTICLE I

RIGHT OF USE

Amtrak hereby grants to LIRR and LIRR hereby accepts from Amtrak the following rights: (1) the right to use, in common with Amtrak and all those claiming by, under, or through Amtrak (the "Amtrak Derivative Users"), all of the Leased Property, as that term is hereinafter defined, to handle and carry LIRR's passenger, freight (in emergencies only, subject to the safety requirements of Amtrak and supervised by Amtrak, subject to the provisions of the Joint Venture Agreement), baggage, mail, and express traffic between the westerly terminus of the LIRR system in the vicinity of Harold Avenue in the County of Queens and the public ways and facilities adjoining Penn Station in the County of New York, and (2) the right to use, in common with Amtrak and the Amtrak Derivative Users, all additions, substitutions, and improvements to the Leased Property for such purposes.

The rights hereby granted and accepted are subject to the terms and conditions hereafter set forth in this Agreement.

ARTICLE II

DIVISION OF LEASED PROPERTY INTO ZONES

For purposes of this Agreement, the Leased Property, the use of which is granted to LIRR in Article I above, shall consist of zones as follows:

Zone 1: This zone shall consist of all of those facilities and appurtenances of Penn Station (a) which are located upon or consist of its first floor level above the tracks (hereinafter designated as the arrival concourse), which floor level is located approximately at elevation 308 ± P.R.R. datum (Manhattan Borough President datum—elevation zero equals elevation 300.17 P.R.R. datum) and extends up to a ceiling at approximate elevation 323 ± P.R.R. datum, and (b) which are embraced generally in the block between 7th and 8th Avenues, and 31st and 33rd Streets, all in the said County of New York. Said Zone 1 is shown on Exhibit A, attached hereto and made a part hereof. Zone 1, except for the part thereof which is designated Zone 1a hereunder, is considered to have been designed and constructed for the use of Amtrak.

Zone 1a: This zone shall consist of that portion of Zone 1 which is outlined in red on Exhibit A, attached hereto and made a part hereof. Said Zone 1a is considered to have been designed and constructed for the use of LIRR. Areas within Zone 1a that are occupied by the New York City Transit Authority are crosshatched on Exhibit A.

Zone 1b: This zone shall consist of that part of Zone 1 which is not included in Zone 1a. As stated above, it shall be considered to have been designed and constructed for the use of Amtrak.

Zone 2: This zone shall consist of all of that land and all of those facilities and appurtenances situated

at track level in Penn Station and located between the east house line of Tenth Avenue in New York County and the west portals of the East River Tunnels (which portals are situated between Sixth and Seventh Avenues in New York County), with the exception of the mail handling facilities, and the third rail and catenary systems. For reference purposes, this Zone 2 and subdivisions of same shall be as indicated on the plan marked Exhibit B, attached hereto and made a part hereof.

Zone 2a: The portion of Zone 2 which is tinted in orange and designated as Zone 2a (and which shall be considered as having been designed and constructed for the use of LIRR) comprises that portion of Zone 2 north of a line (a) beginning at the east property line of said Tenth Avenue, at a point 193 feet south of the south property line of said 33rd Street, (b) extending eastwardly, parallel to said 33rd Street, to a point where it intersects the center line between the two ladder tracks adjacent to Yard C, (c) extending thence along said center line to a point where it intersects a line 115 feet south of and parallel to the south property line of said 33rd Street and (d) extending thence along said line to an intersection with the west property line of said Seventh Avenue; together with all land, facilities and appurtenances (mail handling facilities, third rail and catenary systems again excluded) situated between the west property line of said Seventh Avenue and the west portals of the two East River Tunnels which are used for Nos. 3 and 4 tracks.

Zone 2b: The portion of Zone 2 which is tinted in yellow and designated as Zone 2b (and which shall be considered as having been designed and constructed for the joint use of LIRR and Amtrak) comprises that portion of Zone 2 between Ninth and Seventh Avenues abutting and south of Zone 2a and north of a line

(centerline between tracks 12 and 13) 206 feet south of and parallel to the south property line of said 33rd Street; together with all land, facilities and appurtenances (mail handling facilities, third rail and catenary systems again excluded) situated between the west property line of said Seventh Avenue and the west portals of the two East River Tunnels, which are used for Nos. 1 and 2 tracks, and lying north of a line described as follows: commencing at a point where the said portals intersect the center line between said Track Nos. 1 and 2, running thence westerly along said center line from the portals to a point intersected by a line parallel to a ladder track under said Seventh Avenue; thence along said last mentioned line to a point where it intersects said line (centerline between tracks 12 and 13) 206 feet south of and parallel with said 33rd Street; together with a 12-foot strip abutting the southerly line of Zone 2a, beginning at a point 200 feet east of the easterly property line of said Tenth Avenue and running to the easterly property line of said Ninth Avenue. It is understood that the parties are engaged in an engineering review of a proposed track connection to provide access from LIRR's J.D. Caemmerer West Side Yard to station tracks 13 and 14 and that the foregoing description is subject to minor revision following the outcome of such review.

Zone 2c: That portion of Zone 2 which is tinted in green and designated as Zone 2c (and which shall be considered as having been designed and constructed for the use of Amtrak) comprises the remainder of Zone 2.

Zone 3: This zone shall consist of all of that land and all of those facilities and appurtenances, except the third rail and catenary systems, comprising the two East River Tunnels, which are used for Nos. 3 and 4 tracks, from the west portals thereof between Sixth

and Seventh Avenues in the County of New York to the junction of said tracks with the tracks of LIRR in the vicinity of Harold Avenue in the County of Queens, but not including the facilities of Amtrak in Sunnyside Yard, all as shown on Exhibit C, attached hereto and made part hereof. This Zone 3 shall be considered as having been designed and constructed for the use of LIRR.

Zone 4: This zone shall consist of all of that land and all of those facilities and appurtenances, except the third rail and catenary systems, comprising the two East River Tunnels, which are used for Nos. 1 and 2 tracks, from the west portals thereof between Sixth and Seventh Avenues in the County of New York to the junction of said tracks with the tracks of LIRR in the vicinity of Harold Avenue in the County of Queens, but not including the facilities of Amtrak in Sunnyside Yard, all as shown on Exhibit C, attached hereto and made a part hereof. This Zone 4 shall be considered as having been designed and constructed for the use of Amtrak.

Third Rail Zone: This zone shall consist of all the third rail facilities, whether on or off the Leased Property, for the transmission, conversion, and distribution of electric power for D.C. traction throughout the entire Leased Property. This Zone shall be considered as having been designed and constructed for the use of LIRR.

Catenary Zone: This zone shall consist of all the catenary facilities for the transmission, conversion, and distribution of electric power for A.C. traction throughout the entire Leased Property. This Zone shall be considered as having been designed and constructed for the use of Amtrak.

ARTICLE III

USE OF ZONES

As stated in Article I of this agreement, the rights of use therein granted to LIRR are to be exercised in common with Amtrak and the Amtrak Derivative Users and the reference in any Zone designation set forth in Article II to an understanding that such Zone is considered to be designed and constructed for the use of but one of the parties hereto is intended to control primarily with respect to the allocation of costs, as hereinafter provided. Nevertheless, each of the parties agrees, for itself and those claiming by, under, or through it, that in the normal course of its operations it will confine its use and occupancy of the Leased Property to Zones thereof designated above as having been designed and constructed for it (or for it and the other party, jointly) and will use and occupy Zones of the other only for temporary operating convenience or necessity. The provisions of the preceding sentence shall not apply to the use and occupancy of Zones 3 and 4 or any other Zones physically located in Zones 3 and 4, as to which Zones the use and occupancy by LIRR and Amtrak and the Amtrak Derivative Users shall be in common; provided, however, that (1) LIRR shall have priority as to the use and occupancy of Zone 3 (and Zones physically located therein) in the event that its capacity is threatened and Amtrak and the Amtrak Derivative Users shall have priority as to the use and occupancy of Zone 4 (and Zones physically located therein) in the event that its capacity is threatened and (2) notwithstanding such rights of priority, this proviso shall not operate to deprive either LIRR of its use of Zone 4 or Amtrak and the Amtrak Derivative Users of their use of Zone 3 at use-levels actually prevailing as of the date of this Agreement. At the date of this Agreement these use-levels are as follows: LIRR's daily weekday average usage of Zone 4, counting both eastward and westward movements, is a total of 69 trains, generally operated during the morning and evening "rush" hours; and the daily weekday average usage of Zone 3 by

Amtrak and the Amtrak Derivative Users, counting both eastward and westward movements, is a total of 5 trains. Notwithstanding anything to the contrary set forth elsewhere in this Agreement, such use-level protecting LIRR shall operate to protect no person other than LIRR and the successor to or assignee of substantially the entire business of LIRR. The parties contemplate undertaking certain signal improvements in the East River tunnels and acknowledge that the nature of such improvements, the technical consents and approvals required therefor, and the methods of funding such improvements, are matters that will be addressed in a separate agreement between the parties. Nonetheless, the parties agree that LIRR shall have priority as to the use and occupancy of any additional capacity in both directions created in Zones 3 and 4 by virtue of signal improvements to be made therein by LIRR pursuant to the agreement referred to in the preceding sentence; provided, however, that Amtrak and LIRR shall share equally the use and occupancy of any additional capacity westward on No. 1 Track and eastward on No. 2 Track if Amtrak pays one-half of the incremental cost of reverse signal improvements on Nos. 1 and 2 Tracks. The utilization of individual slots shall be determined by Operating Representatives chosen by the parties. Nothing herein is intended to establish permanently a direction of traffic in Zones 3 or 4.

ARTICLE IV

ADDITIONS AND ALTERATIONS

(1) Subject to the provisions of subdivision (2) of this Article IV: (a) Changes in or additions to any land, facilities, or appurtenances constituting a part of the Leased Property that are desired by Amtrak shall be paid for by Amtrak. Changes in or additions to any land, facilities, or appurtenances constituting a part of the Leased Property that are desired by LIRR shall be paid for by LIRR.

(b) Amtrak and LIRR, or either of them, may make only such changes in or additions to the land, appurtenances, or facilities constituting Zones 1a, 2a, 2b, 3, 4, or the Third Rail Zone of the Leased Property as shall be mutually agreed upon by them in writing.

(c) Changes in or additions to any land, facilities, or appurtenances constituting a part of the Leased Property which are required by law, rule, or regulation, or by the lawful order of any governmental agency, shall be paid by the parties in the same ratio as they share or are separately responsible for the direct cost of maintenance and operating services performed by Amtrak in the Zone affected by such changes or additions, excepting changes and additions related to concession operations as to which payment shall be made by the party responsible for the concession as provided in Article VIII hereof.

(2) Notwithstanding the provisions of subdivision (1) of this Article IV: (a) during such time as the Level A Lease is in effect, all changes in or additions to the property, appurtenances, and facilities constituting the LIRR Premises, the payment of the costs thereof, and any consents necessary thereto, shall be governed by the Level A Lease to the extent that such change or addition is permitted or consented to by LIRR in the Level A Lease; (b) during such time as the Joint Venture Agreement (or a successor arrangement as provided therein) is in effect, all changes in or additions to the Joint Improvements or the Solely Owned Improvements, as those terms are defined in the Joint Venture Agreement, the payment of the costs thereof, and any necessary consents thereto, shall be governed by the Joint Venture Agreement (or by such successor arrangement); (c) no changes or additions will be made to land, appurtenances, or facilities covered by this Agreement without the consent of the affected parties to the Joint Venture Agreement if such change or addition would adversely affect easement rights granted under the Joint Venture Agreement; and (d) during such time as the Yard B Lease is in effect, all changes in or additions to the land,

appurtenances, and facilities within that portion of Zone 2a that is the subject of the Yard B Lease shall be governed by the Yard B Lease as and to the extent that the provisions of the Yard B Lease either conflict with or supplement the provisions of subdivision (1) of this Article IV.

ARTICLE V

RENT

Simultaneously with the execution of this Agreement, LIRR shall pay to Amtrak the sum of five million dollars ($5,000,000), as a full and complete fixed rental for the rights herein granted.

ARTICLE VI

COST SHARING

Subject to the liability provisions of Article X below, the direct cost of maintenance and operating services performed by Amtrak in respect of the Leased Property during the term of this Agreement shall be shared by the parties as provided in this Article VI, assuming in each case in which costs are shared or computed on the basis of usage that the usage of each party hereto includes the usage of entities claiming by or through it.

(1) Zones 1a, 2a, and 3—(a) Subject to the provisions of paragraph (b) of this subdivision, all such direct cost properly assignable to such Zones shall be charged to LIRR, except that cost assignable to any concession in Zone 1a shall be borne by the party responsible for such concession.

(b) Notwithstanding the provisions of paragraph (a) of this subdivision: (i) during such time as the Level A Lease is in effect, no costs that are properly assignable to the LIRR Premises shall be charged to LIRR except under the Level A Lease, with the exception of certain interim utility charges under subdivision (9) of this Article VI; (ii) all costs

attributable to the operation, maintenance, repair, or replacement of any Joint Improvement or Solely Owned Improvement shall be governed by the Joint Venture Agreement (or any successor arrangement) during such time as the Joint Venture Agreement (or such successor arrangement) is in effect; and (iii) during such time as the Yard B Lease is in effect, no costs that are properly assignable to that portion of Zone 2a that is the subject of the Yard B Lease shall be charged to LIRR, except as provided in the Yard B Lease or as agreed to by the parties.

(2) Zones 1b and 2c—(a) Subject to the provisions of paragraph (b) of this subdivision, all such direct cost properly assignable to such Zones shall be charged to Amtrak.

(b) Notwithstanding the provisions of paragraph (a) of this subdivision, any costs attributable to the operation, maintenance, repair, or replacement of any Joint Improvement or Solely Owned Improvement shall be governed by the Joint Venture Agreement (or any successor arrangement) during such time as the Joint Venture Agreement (or such successor arrangement) is in effect.

(3) Zone 2b—(a) All such direct cost properly assignable to such Zone 2b shall be shared by LIRR and Amtrak in the proportion that the number of cars and locomotives of each of them (or Amtrak's Derivative Users) entering or exiting the station tracks of this Zone bears to the total number of cars and locomotives entering or exiting the station tracks of this Zone. Each locomotive shall be counted as one car. Trains to be included in such surveys shall include revenue and non-revenue passenger trains, locomotives, freight trains, and work trains; provided, however, that neither work trains nor track car vehicles that are employed in maintenance within the Control Territory, as that term is defined in the Joint Venture Agreement, shall be counted in such surveys. The use ratios of 91.1 percent for LIRR and 8.9 percent for Amtrak and its Derivative Users shall be used for the apportionment provided by this paragraph (a) until one of the parties hereto

shall request a new count. Upon the request of either party hereto, two new counts will be taken of the use of Zone 2b, one reflecting summer traffic conditions and the other winter traffic conditions, the winter and summer data shall be averaged, and new use ratios derived for application to this paragraph (a) (such application to be effective with the calendar month immediately following the calendar month in which the latter of the two surveys is completed). Such surveys shall be made jointly, shall cover seven (7) consecutive days, none of which may be a holiday or be affected by a holiday, and shall comport with the past practice of the parties. Such surveys shall be conducted at mutually agreeable locations that will assure reasonable accuracy in counting movements, including drill movements. Thereafter, upon the request of either party, made at any time and from time to time, like surveys shall be made and the ratios derived therefrom shall be applied to this paragraph (a), effective in like fashion.

(b) Notwithstanding the provisions of paragraph (a), any costs attributable to the operation, maintenance, repair, or replacement of any Joint Improvement or Solely Owned Improvement shall be governed by the Joint Venture Agreement (or any successor arrangement) during such time as the Joint Venture Agreement (or such successor arrangement) is in effect.

(c) Notwithstanding the provisions of paragraph (a) of this subdivision: (i) Amtrak shall, at its sole cost, clean, maintain, and repair: all stairs and escalators between track level and B Level, which currently include 9F, 8F, 7F, and 7B; freight elevators 7B, 8B and passenger elevators 7P and 8P; all stairs and escalators between Level A and Level B which are not leased to LIRR in the Level A Lease; underplatform spaces and access means thereto; signal control apparatus located on or beneath platforms; structures housing interlocking and/or signal control equipment; piping, conduit and cooling facilities that are appurtenant to the operation of Amtrak equipment or that serve common utility systems; fixtures and

appurtenances to C tower; and Amtrak signal cases; and (ii) LIRR shall have the sole responsibility, at its cost: for cleaning all ceilings, walls, partitions, floors, windows and doors associated with platforms 7 and 8, and for determining the architectural treatment of the surfaces of platform 8, as well as the platform fascia, column surfaces, and ceilings associated with platform 8; for cleaning, maintaining and repairing all LIRR communications equipment, including public address, telephone and radio equipment and associated appurtenances, as well as LIRR train destination signs and other LIRR passenger-related signage regardless of location, and LIRR lighting fixtures.

(4) All such direct cost (including cost of material and supplies) properly assignable to A, C, JO, and KN interlockers shall be allocated among Zones 2a, 2b, 2c, 3, and 4 in the ratio that the Relative Unit Values, as assigned by A.A.R. Manual, Part 203 ("RUVs") in each such interlocker governing the movements on the tracks in each of the five Zones bears to the total of RUVs in that interlocker. It is agreed, for present purposes, that the following percentages, which reflect RUVs, shall be used in allocating each of the three cost categories (maintenance, operating, and materials/ supplies) of these interlockers:

Interlockers	*Zone 2a*	*Zone 2b*	*Zone 2c*	*Zone 3*	*Zone 4*
A	11.97	11.33	76.7	0	0
C	23.39	24.94	0	51.67	0
JO	0	27.78	33.86	0	38.36
KN	100	0	0	0	0

Upon the request of either party, made at any time and from time to time, new RUV counts shall be made and the resultant changes, if any, appearing in these percentages shall be applied to this subdivision (4) allocation effective with the calendar month immediately following the calendar month in which the new RUV count for any interlocker is completed.

(5) Zone 4—all such direct cost properly assignable to this Zone shall be shared by the parties in the proportion that the number of cars and locomotives of each of them (or Amtrak's Derivative Users) using such Zone bears to the total number of cars and locomotives using such Zone. Current use ratios, that is, 31.71% for LIRR and 68.29% for Amtrak, shall be used for apportionment under this paragraph (5) until one of the parties shall request a new count. Upon the request of either party, two new counts will be taken of the use of this Zone, one reflecting summer traffic conditions and the other winter traffic conditions, and the winter and summer data shall be averaged and new use ratios derived for application to this paragraph (5) (such application to be effective with the calendar month immediately following the calendar month in which the latter of the new counts is completed). For the purposes of any count made under this paragraph (5), there shall be subtracted from the number of cars and locomotives of LIRR using Zone 4 the number of cars and locomotives of Amtrak (or Amtrak Derivative Users) using Zone 3 during the same interval, and the net total shall be taken into account in computing the relative percentages of use of Zone 4.

(6) Third Rail and Catenary Zones—all such direct cost properly assignable to the Third Rail Zone (including applicable lease costs) shall be charged to LIRR until such time as Amtrak shall begin to make use of third rail power within the Leased Property, after which time such cost shall be allocated on the basis of actual use. The parties agree to conduct such tests, using metered trains, as may be necessary to determine actual usage of third rail power. All such direct cost properly assignable to the Catenary Zone shall be charged to Amtrak. Power for Third Rail and Catenary Zones shall be purchased and the costs thereof divided according to agreement between the parties or between the parties and the supplier of the power.

(7) All such direct cost (including cost of materials and supplies) properly assignable to F interlocker shall be allo-

cated among Zones 3, 4, Sunnyside Yard (Amtrak), and, if applicable, LIRR's tracks (to be apportioned, as to cost allocated to Zone 4, in the manner provided in subdivision (5) of this Article and to be paid in full by LIRR in the case of cost allocated to Zone 3 and its own tracks) in the ratio that the RUVs in that interlocker governing the movements on tracks in each of the said Zones and areas bear to the total of RUVs in that interlocker. It is agreed, for present purposes, that the following percentages, which reflect RUVs, shall be used in allocating each of the three cost categories (maintenance, operating, and materials/supplies) of this interlocker: Zone 3, 21.86 percent; Zone 4, 23.66 percent; Sunnyside Yard, 20.61 percent; LIRR's tracks, 33.87 percent. Upon the request of either party, made at any time and from time to time, new RUV counts for F interlocker shall be made and the resultant changes, if any, appearing in these percentages shall be applied to this subdivision (7) allocation effective with the calendar month immediately following the calendar month in which the new RUV count for that interlocker is completed.

(8) (a) Subject to the provisions of paragraph (b) of this subdivision, all such direct cost of operating services performed in respect of any part of the Leased Property by Amtrak train directors and dispatchers at Penn Station shall be apportioned monthly between the parties in the ratio that the total number of trains and light engines of each of them (and Amtrak's Derivative Users) dispatched that month from Zone 2 bears to the total number of trains and light engines of both of them (and Amtrak's Derivative Users) dispatched that month from that Zone.

(b) Notwithstanding the provisions of paragraph (a) of this subdivision, upon completion of the Joint Improvements, and thereafter during such time as the Joint Venture Agreement (or any successor arrangement) is in effect, any operating costs attributable to Amtrak employees controlling train movements shall be governed by the Joint Venture Agreement (or such successor arrangement).

(9) (a) Subject to the provisions of paragraph (b) of this subdivision, LIRR agrees to pay to Amtrak, in lieu of utility charges, an amount determined, in accordance with the past practice of the parties, by applying a Consumer Price Index multiplier to the April 1976 base period utility cost of $12,140. Utility charges shall be billed to LIRR on a monthly basis. The monthly amount shall be adjusted semi-annually, using the multiplier for the latest period available prior to such semi-annual adjustment. Upon the request of either party, made at any time and from time to time, the areas of activity for which this charge is assessed shall be reconsidered by the parties, both as to the scope of such activities and as to the equity of any one or more charges provided therein to be assessed against LIRR. Changes shall promptly be made in the amounts payable by LIRR under the provisions of this subdivision (9) to the extent necessary to eliminate inequities. Any such changed amount shall thereafter be subject to the semi-annual Consumer Price Index adjustments provided above. The parties hereby agree that, upon the execution of this Agreement, they shall promptly commission a joint engineering study of utility usage within the Leased Property and, upon completion of such study, shall implement any change in the amounts payable by LIRR under this subdivision (9) determined by such study to be necessary to eliminate inequities. The parties shall use their best efforts to complete such study and implement any new allocations of utility charges thereunder as promptly as possible. If such study is not completed within 180 days after the date of execution of this Agreement, the allocations determined by the study shall be applied retroactively, beginning with the date that is 180 days after the date of execution hereof. Until the new allocations are completed, LIRR shall continue to pay the amounts first mentioned in this subdivision (a).

(b) Notwithstanding the provisions of paragraph (a) of this subdivision: (i) during such time as the Level A Lease is in effect, utility charges in respect of the LIRR Premises shall be billed to, and paid by, LIRR pursuant to the provisions of the

Level A Lease; provided, however, that, from the date of execution of this Agreement until the date of implementation of the findings of the joint engineering study referred to in paragraph (a) of this subdivision, LIRR shall continue to pay the amounts determined under said paragraph (a); and (ii) all utility charges that are assignable to the operation and maintenance of the Joint Improvements and the Solely Owned Improvements shall be governed by the Joint Venture Agreement (or any successor arrangement) during such time as the Joint Venture Agreement (or such successor arrangement) is in effect.

(10) The percentages set forth in this Article in allocating interlocker costs have been derived in accordance with procedures outlined in A.A.R. Manual, Part 203, and in accordance with study and tabulation sheet and plans which are currently on file in the offices of the chief signal officers of LIRR and Amtrak.

(11) Payments made by LIRR pursuant to other subdivisions of this Article VI shall not include any expense incurred by Amtrak in shifting LIRR's cars and locomotives or moving LIRR's trains within the Leased Property, or for servicing, cleaning, inspecting, or repairing cars of LIRR, or for additional services requested by LIRR; and LIRR agrees to repay all such expenses to Amtrak when incurred by Amtrak for or on behalf of LIRR.

(12) Applicable overhead percentages and rental rates established by the General Managers Association of New York shall be updated by application of A.A.R. indices, or such other indices as are mutually agreeable to the parties hereto, and shall apply to all direct costs chargeable under this Article VI, excluding the fixed costs set forth in subdivision (9) to which percentages set forth in that subdivision are to be applied.

(13) The parties acknowledge that payments made hereunder to Amtrak by LIRR are currently exempt from the New

York City Public Utility Excise Tax. LIRR agrees, however, that it will reimburse Amtrak for any such Excise Tax that may be imposed in the future on payments made by LIRR under this Article VI.

(14) Except as otherwise expressly provided in this Article VI, Amtrak shall invoice LIRR monthly for the respective amounts payable pursuant to the provisions of this Article VI. If Amtrak fails to invoice LIRR for any amount payable under this Article VI within two years after the date on which such cost is incurred by Amtrak, Amtrak shall be deemed to have waived the right to invoice LIRR for such charge thereafter. Invoices shall be in sufficient detail to afford immediate audit and shall be due and payable promptly upon receipt by LIRR. If, in the absence of force majeure, LIRR shall fail to pay to Amtrak any such invoiced amount, or any portion thereof, within ninety (90) calendar days after receipt by LIRR of an invoice therefor, such unpaid amount shall bear interest at the lesser of the applicable usury rate, if any, or the then prevailing prime rate for preferred commercial borrowers at Chase Manhattan Bank, N.A., from the date such invoice was received to the date of payment thereof by LIRR. Adjustments found necessary by reason of audit or by reason of any of the provisions of this Agreement shall be made in subsequent months and without requirement for formal objection, all to the end that accounts may be kept current. If any dispute or question shall arise as to any invoice, either party shall have the right to examine the books and records of the other in order to verify the accuracy or completeness of such invoice. Any dispute or objection as to any amount payable pursuant to this Article VI shall be made by LIRR to Amtrak in writing within two (2) years after receipt by LIRR of the invoice relating to the disputed amount, or such dispute or objection shall be waived. Notwithstanding the foregoing, if, within such two year period, LIRR reasonably requests in writing that Amtrak provide additional information relating to such invoice, the two year period referred to above shall be extended, if necessary, so that LIRR shall have no less than

ninety days after receipt of such additional information, or after such information is made available for inspection and review by LIRR, in which to make its written objection. Any adjustment in favor of LIRR made after payment by LIRR shall bear interest at the rate described above in this subdivision (14) from the date of such payment by LIRR until the date of repayment by Amtrak.

ARTICLE VII

CONTINUATION OF SERVICES; REVENUES

(1) (a) Subject to the provisions of paragraph (b) of this subdivision, Amtrak covenants and agrees to continue to provide to LIRR in a prompt and workmanlike manner the maintenance and operating services referred to in Article VI above at the same general level of service as prevailed at the date of execution of this Agreement, subject to interruptions attributable to force majeure. Subject to written waiver by LIRR expressly permitting an earlier cessation, Amtrak may cease providing such services only upon not less than three (3) years advance notice to LIRR to that effect. So long as Amtrak shall be capable of providing such services and shall be bound to do so by the provisions of this Agreement, no part thereof may be taken over or assumed by LIRR without the written consent of Amtrak, which consent shall not be unreasonably withheld.

(b) Notwithstanding the provisions of paragraph (a) of this subdivision: (i) the maintenance of, and operating services to, the Joint Improvements or the Solely Owned Improvements shall be governed by the provisions of the Joint Venture Agreement (or any successor arrangement) during such time as the Joint Venture Agreement (or such successor arrangement) is in effect; (ii) during the term of the Level A Lease, the maintenance of, and operating services to, the LIRR Premises shall be governed by the provisions of the Level A Lease; and (iii) during the term of the Yard B Lease, the

maintenance of, and operating services to, that portion of Zone 2a that is the subject of the Yard B Lease shall be governed by the provisions of the Yard B Lease.

(2) (a) Subject to the provisions of paragraph (b) of this subdivision, net revenues derived by Amtrak from the grant by it to third parties of rights in respect of all or any part of Zones 1a, 2a, 2b, 3, or 4, whether such grants be by way of lease, license, franchise, concession, or other form, shall be divided between Amtrak and LIRR in the same ratios as the parties are required by the provisions of Article VI of this Agreement to bear the direct cost of maintenance and operating expenses of the particular Zone or Zones to which such net revenues are attributable; but this sentence shall not apply to Zone 1a concessions granted and controlled by Amtrak as hereinafter provided in Article VIII, nor shall it be construed to permit Amtrak, without LIRR's written consent, hereafter, (i) to grant rights to third parties in any of the said Zones 1a, 2a, 2b, 3, or 4 that are in any respect in derogation of the rights granted to LIRR by this Agreement, or (ii) to grant any rights in Zone 1a except concession rights as hereinafter provided in Article VIII. Notwithstanding the provisions of this paragraph (a), LIRR shall have no interest in the revenues derived by Amtrak from the grant by it of a right to use any part of the Leased Property for railroad operations, from easements for the office building or sports center now situated over the Property, or from any subsequent redevelopment of the area above any portion of the Property. Nothing in the preceding sentence, whether express or implied, shall be construed to diminish or to alter in any manner the rights of LIRR under this Article, Article IV, or under the Level A Lease.

(b) Notwithstanding the provisions of paragraph (a) of this subdivision: (i) during the term of the Joint Venture Agreement (or any successor arrangement), Amtrak may not grant any rights to third parties in Zones 2a, 2b, 3, or 4 that are in any respect in derogation of LIRR's rights under the

Joint Venture Agreement (or such successor arrangement) or the Level A Lease; (ii) during the term of the Level A Lease, except as provided in that Lease, no rights may be granted or revenues derived by Amtrak in respect of the LIRR Premises; and (iii) during the term of the Yard B Lease, any provision thereof that is inconsistent with any provision of paragraph (a) of this subdivision shall prevail over any such provision of paragraph (a).

ARTICLE VIII

CONCESSIONS

(1) Subject to the provisions of subdivision (2) of this Article, those Zone 1a concessions that are immediately related to the operations of LIRR, such as porter collections, parcel lockers, and toilet locks, and all Zone 2a concessions, shall be granted by and under the control of LIRR and it shall retain the revenues therefrom. All other Zone 1a concessions shall be granted by and under the control of Amtrak and it shall retain the revenues therefrom. All Zone 2b concessions shall be granted by and under the joint control of both LIRR and Amtrak and they shall share in the net revenues derived therefrom in the same proportion as applies to the net revenues referred to in Article VII (2). Suitability and location of all Zone 1a and Zone 2b concessions shall be determined by mutual agreement of the parties. Each party shall be responsible for the concessions separately granted by it.

(2) During the term of the Level A Lease, the provisions of subdivision (1) of this Article VIII shall not apply to the LIRR Premises.

ARTICLE IX

TRAIN MOVEMENTS

(1) Subject to the provisions of subdivision (2) of this Article IX, Amtrak shall control the movement through the

Leased Property of such trains as LIRR and anyone claiming by, through, or under LIRR shall desire to move under this Agreement, and as nearly in accordance with their wishes as can be done without unreasonably interfering with the movements of Amtrak and the Amtrak Derivative Users, and shall, if necessary, place such trains upon Amtrak's own schedules. In arranging schedules, Amtrak shall not discriminate against such trains, but shall give them equal rights with Amtrak's own trains.

The trains, engines, and employees of LIRR and others, while upon the Leased Property, shall be subject to the regulations and orders of the Superintendent or other proper officer of Amtrak. Timetable and Book of Rules of LIRR will apply and be the authority for movement of trains of LIRR, as long as they are compatible with those of Amtrak.

(2) Notwithstanding the provisions of subdivision (l) of this Article IX, upon completion of the Joint Improvements and during the term of the Joint Venture Agreement (or any successor arrangement), the control of train movements into, out of, and within the Leased Property shall be governed by the provisions of the Joint Venture Agreement (or such successor arrangement).

ARTICLE X

LIABILITY

(1) Subject to the provisions of subdivisions (2), (3), and (4) below:

(a) All rights with respect to the Leased Property herein granted to LIRR are granted with the understanding and upon the express condition that each of the parties hereto shall be severally and not jointly responsible for loss of or damage to any and all roperty and injury to or death of any and all persons caused by or arising from the sole fault or negligence of itself or its employees.

(b) When any loss, damage, injury, or death shall occur and shall be caused by or arise from the joint fault or negligence of the parties hereto or their employees, each party shall assume all responsibility for loss of or damage to its own property and of or to all other property in its charge or custody and for all injury to or death of its employees; and all other loss, damage, injury, or death so occurring, and any expense incurred by either in connection therewith, shall be borne equally by the parties hereto.

(c) When any loss, damage, injury, or death shall occur and shall be caused by or arise from the fault or negligence of either party hereto or its employees combined with the fault or negligence of any third party or parties or the employees thereof, the party hereto at fault or whose employees are at fault shall indemnify and save the other party hereto harmless against any claim or loss arising therefrom and against any expense incurred by the other party in connection therewith.

(d) Each of the parties hereto agrees that it will pay all claims for which it is made responsible by the foregoing provisions of this Article and that it will save harmless the other party in respect of every such claim and all consequent cost and expense.

(e) The provisions of this Article are not intended to, and shall not, confer benefits upon any person not a party to this Agreement.

(2) Notwithstanding the provisions of subdivision (1) above, but subject to the provisions of subdivisions (4) and (5) below, during the term of the Joint Venture Agreement (or any successor arrangement), the Joint Venture Agreement (or any successor arrangement) shall govern the allocation of liability for injury to or death of any and all persons ("personal injury") and loss of or damage to any and all property ("property damage") arising out of the design, construction, installation, operation, maintenance, repair,

or replacement of any of the Joint Improvements or the Solely Owned Improvements.

(3) Notwithstanding the provisions of subdivision (1) above, but subject to the provisions of subdivisions (4) and (5) below, following the commencement of operations of the Central Control System, as described in the Joint Venture Agreement, and during the remaining term of the Joint Venture Agreement (or any successor arrangement), the parties hereto shall share equally all liability for personal injury and for property damage occurring within Zones 2, 3, or 4 of the Leased Property.

(4) Notwithstanding the provisions of subdivisions (1), (2) and (3) above, during the term of the Level A Lease:

(a) Subject to paragraph (c) of this subdivision (4), all liability for personal injury and property damage occurring within the LIRR Premises (including all portions of platforms, and all escalators, elevators, and stairways within the LIRR Premises) shall be borne entirely by LIRR.

(b) Subject to paragraph (c) of this subdivision (4), all liability for personal injury and property damage occurring on Level B or in Zone 1, other than within the LIRR Premises, or on station platforms within Zone 2c (or on or in escalators, elevators, or stairways beginning or ending on such platforms), shall be borne entirely by Amtrak.

(c) The foregoing paragraphs (a) and (b), as well as subdivision (6) below, shall not make either Amtrak or LIRR liable for personal injury or property damages, or claims arising from such personal injury or property damage (including claims for punitive damages), where the personal injury or property damage results from the gross negligence or willful or wanton misconduct of the other (including its officers, agents, employees and subsidiaries).

(5) Notwithstanding the provisions of subdivisions (1), (2), (3) and (4) above, the Yard B Lease, during the term thereof,

shall govern the allocation of liability for personal injury and property damage arising out of any accident or occurrence, howsoever caused, in or as a result of the construction (including design) of improvements by LIRR pursuant to the Yard B Lease.

(6) Subject to paragraph (c) of subdivision (4) of this Article X, each party shall be responsible for, and shall defend, settle, and/or satisfy all claims arising from or pertaining to personal injury and property damage, the liability for which has been allocated to it by the provisions of subdivision (2), (3), (4), or (5) of this Article X, and shall indemnify and hold harmless the other party (including officers, agents, employees, and subsidiaries of the other party) against and from any and all loss, damage, and expense arising from or pertaining to such claims, irrespective of any negligence or fault of such other party (or of its officers, agents, employees, or subsidiaries). The provisions of this Article X are not intended to, and shall not, confer benefits upon any person not a party to this Agreement.

ARTICLE XI

EFFECTIVE DATE; TERM

This Amended and Restated Agreement shall be effective upon payment by LIRR of the full rent pursuant to Article V above. The date of that payment is referred to herein as the "Effective Date." The Agreement shall continue in full force and effect for a term of ninety-nine (99) years from the Effective Date of this Amended and Restated Agreement. In the event that LIRR ceases or plans to cease to operate within the County of New York, LIRR may terminate this Agreement on not less than five years' written notice to Amtrak.

The parties recognize that LIRR has the right under the Level A Lease to occupy certain space in Penn Station for a term of 198 years. In the event that this Agreement is in effect at the end of its term of 99 years, the parties agree to meet

prior to the end of such term to negotiate such extension and/or modifications as may be appropriate.

ARTICLE XII

WARRANTY OF QUIET ENJOYMENT

Upon the payment by LIRR to Amtrak of all amounts coming due hereunder and the performance and observance by LIRR of all covenants and promises on its part to be performed and observed hereunder, Amtrak warrants that during the term of this Agreement LIRR will peacefully and quietly enjoy the rights granted to it hereunder, free of let, hindrance or interference by anyone. There is excepted from this warranty any right granted hereunder as to which Amtrak's own enjoyment thereof is dependent upon a franchise to use streets or other public ways. Also excepted from this warranty are any rights granted hereunder with respect to the West End Concourse, and rights granted hereunder with respect to track 13 to the extent such rights are additional to the rights granted to LIRR in relation to track 13 under the 1966 Agreement. As to such rights excepted from the foregoing warranty, as long as LIRR performs and observes all of the covenants and promises on its part to be performed and observed hereunder, Amtrak warrants that during the term of this Agreement LIRR will peacefully and quietly enjoy such rights without molestation or hinderence by Amtrak or its successors or assigns.

* * *

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of the date first herein set forth.

ATTEST:
/s/ [ILLEGIBLE]
(CORPORATE SEAL)

NATIONAL RAILROAD
PASSENGER CORPORATION
By: /s/ [ILLEGIBLE]

ATTEST:
/s/ [ILLEGIBLE]
(CORPORATE SEAL)

THE LONG ISLAND
RAIL ROAD COMPANY
By: /s/ [ILLEGIBLE]

* * *

PLAINTIFF'S EXHIBIT 84

[LETTERHEAD OF WEIL, GOTSHAL & MANGES]

January 19, 1993

By Fax

Mark S. Landman, Esq.
Siff Rosen P.C.
Woolworth Building
233 Broadway
New York, New York 10279

David M. Kohane, Esq.
Kostelanetz Ritholz Tigue & Fink
80 Pine Street
New York, New York 10005

Re: Lebron v. National Railroad Passenger Corp. (Amtrak) and Transportation Displays, Inc., 92 Civ. 9411 (PNL) (S.D.N.Y.)

Dear Mark/David:

At the Gallagher, Delaney and Bourque depositions, we made various requests for the production of documents which you have yet to respond to. Specifically, we believe the following requests remain outstanding:

1. Production of all documents related to the process through which applications for free speech permits are handled. At the Gallagher deposition, it became apparent that additional documents may exist:

a. concerning the decision whether to approve or deny an application (including samples of the materials the applicant desires to distribute at Penn Station);

b. in files that may be located in Amtrak offices other than the Station Services office; and

c. relating to the forms and methods used to notify applicants of Amtrak's decision on their requests.

2. Production of all free speech applications and related documents back through 1985.

3. A copy of the March 1991 outdoor billboard license agreement.

4. Copies of the minutes of all Board of Directors or Board committee meetings at which Amtrak's advertising policy or any Amtrak/TDI contract was considered, back through and including 1985.

5. The second document noted in the margin of Plaintiff's Exh. 3, ¶ 31 on page 11. (The first document—31-01-047—is the 1980 Spectacular agreement, which Amtrak has already produced.) The identifying number *appears* to be 08-01-025, but the number may be more legible on the original document that Amtrak photocopied for production. We are requesting the second document, whatever the correct identifying number is, that was superseded by the 1985 agreement.

Please let us know when we may expect production of these materials, which should not, in any event, be later than the close of business on Wednesday, January 20.

Defendants have repeatedly offered to stipulate to certain facts, thereby obviating their need to produce witnesses and/or documents in response to plaintiff's requests. To that end we request that Amtrak and/or TDI provide us with the following information (where necessary) and stipulations to the following facts:

A. that certain of the retail space that Amtrak leases in Penn Station is leased to bookstores and newsstands, which sell assorted titles, including many books and magazines on political issues.

B. a physical description (dimensions of each side and height) and location of the kiosks located in Penn Station. (To be provided by the defendants).

C. the number and dimensions of the advertising spaces/posters located in that area of Penn Station where the Amtrak and NJ Transit ticket counters are located, including the dimensions of such boards and a description of where they are placed in that ticket area. (To be provided by the defendants).

D. that in the early 1970s, all but three existing railroads contracted with Amtrak to enable Amtrak, for a fee, to take over their services and relieve them of their responsibilities.

E. that the United States paid $2.113 billion in cash to Penn Central Corporation on January 15, 1981, pursuant to the terms of a settlement agreement entered into by the United States, the United States Railway Association, and Penn Central Corporation.

F. that Amtrak currently does more than half of its business in the Northeast Corridor.

G. that Amtrak is the largest carrier of any kind in the area that is comprised of the Northeast Corridor.

Please let us know, also by Wednesday at close of business, whether you are willing to stipulate to any or all of the above facts. If you have any questions concerning the above, or would like to propose alternative language, please contact me as soon as possible.

Finally, we need to exchange corrected versions of the deposition transcripts. Please let us know when you would like such an exchange to take place.

Sincerely,

/s/ ROBIN E. SILVERMAN
Robin E. Silverman

RES:ar

PLAINTIFF'S EXHIBIT 85

[LETTERHEAD OF AMTRAK]

January 21, 1993

BY FACSIMILE

Robin E. Silverman, Esq.
Weil, Gotshal & Manges
767 Fifth Avenue
New York NY 10133-0119

Re: *Lebron v. National Railroad Passenger Corp.*

Dear Robin:

This letter responds to the additional document requests that Gloria Phares and you made during the depositions of Messrs. Delaney and Bourque and in the letter you sent to Mark Landman on the afternoon of January 19. It also responds to the requests for stipulations that you listed in your letter.

The numbers and letters identifying the paragraphs correspond to the numbered and lettered paragraphs in your letter. The general objections set forth in my January 13 response to your second set of discovery requests are incorporated by reference. In addition, Amtrak's agreement to stipulate to certain matters as set forth below is without prejudice to Amtrak's right to contend that those matters are not relevant to the pending lawsuit.

Unless you advise me otherwise, in lieu of making the additional documents identified below available for your inspection and copying as required by Fed. R. Civ. Pro. 34(a), Amtrak will promptly copy them and deliver the copies to David Cole as per prior instructions from him. You will be invoiced for the copying costs at Amtrak's standard rate of 20 cents a page.

Document Requests

1. Amtrak objects to this request on the grounds that the request is based upon a mischaracterization of Mr. Gallagher's testimony, the request is burdensome, and the requested documents are irrelevant and unlikely to lead to the discovery of admissible evidence. Without waiving this objection, Amtrak has searched its files for documents dated within the three-year period specified in plaintiff's prior request on this matter and has not located any responsive documents not already produced.

2. Amtrak objects to this request on the grounds that it is burdensome and harassing and the requested documents are irrelevant and unlikely to lead to the discovery of admissible evidence. In response to plaintiff's prior request for "free speech" permits, which was limited to a three-year period (see the statements of Ms. Phares at p. 166 of the DeAngelo Deposition), Amtrak searched for and produced all responsive documents, and produced for deposition a witness who could testify concerning them. Amtrak should not be required to conduct a second search of its files because plaintiff has now, without reason or explanation, decided to broaden the time period specified in the previous request.

3. Amtrak objects to this request on the grounds that it is overly broad and seeks the production of an irrelevant document unlikely to lead to the discovery of admissible evidence. Without waiving this objection, Amtrak is producing the requested document.

4. Without waiving its previous objections to the production of Board and Board committee minutes relating to matters other than advertising policies (of which there are none), the Spectacular (Amtrak is producing two such minutes located since its prior production), or Amtrak's current contracts with TDI that govern the Spectacular, Amtrak has searched for and is producing all responsive documents that have not previously been produced.

5. Amtrak objects to this request on the grounds that it is overly broad and seeks the production of an irrelevant document unlikely to lead to the discovery of admissible evidence. Without waiving this objection, Amtrak is producing the contract identified by file number 08-01-025 (a July 16, 1981 contract between TDI and the Washington Terminal Company).

In addition, as Ms. Phares requested at the deposition of Mr. Bourque, I have checked the "original" of the April 27, 1988 letter from Winston Network, Inc., to Mr. Bourque (which is itself a copy) and have confirmed my representation that the signature line is cut off just as it is in the copy Amtrak produced to you.

Stipulations

A. Amtrak is prepared to enter into the proposed stipulation.

B. Amtrak is prepared to enter into a stipulation on this subject. However, Amtrak cannot consider such a stipulation until you identify the dimensions and locations that you propose to include in the stipulation.

C. Amtrak is prepared to enter into a stipulation on this subject. However, Amtrak cannot consider such a stipulation until you identify the numbers, dimensions, and description that you propose to include in the stipulation.

D. Amtrak is prepared to stipulate that in 1971, all but three of the U.S. railroads then providing intercity passenger service entered into contracts with Amtrak that called for Amtrak to take over their intercity passenger services and to relieve them of any responsibility to provide such services, in return for which the railroads made the payments specified in the Rail Passenger Service Act of 1970.

E. Amtrak is prepared to stipulate that a settlement agreement was entered into among the United States, the United

States Railway Administration, and the Penn Central Corporation in late 1980, and that, pursuant to the terms of that agreement, the United States or an agency thereof subsequently made a payment to Penn Central Corporation. Amtrak, which was not a party to that agreement, has no information concerning the date or amount of the payment or whether the payment was made directly by the United States, and therefore cannot stipulate to these matters.

F. Amtrak is prepared to stipulate that, during fiscal year 1992, approximately 47% of its ridership was derived from the Northeast Corridor. (See 1992 Amtrak Annual Report, p. 17.)

G. Amtrak does not understand the proposed stipulation.

Finally, Amtrak again requests that you respond to Amtrak's prior request for a stipulation concerning the ownership of Amtrak's common stock shares.

Sincerely,

/s/ RICHARD G. SLATTERY
Richard G. Slattery
Associate General Counsel

RGS/

cc (by facsimile): Gloria C. Phares, Esq.
David Cole, Esq.
David M. Kohane, Esq.
Mark S. Landman, Esq.

PLAINTIFF'S EXHIBIT 86

[LETTERHEAD OF SIFF ROSEN P.C.]

January 21, 1993

VIA FACSIMILE

Robin E. Silverman, Esq.
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10133-0119

Re: Lebron v. National Railroad Passenger Corp., et al.
No. 92 Civ. 9411 (PNL)

Dear Robin:

This is to confirm that Amtrak and plaintiff agree to the following stipulation regarding ownership of Amtrak stock:

> Amtrak's preferred stock shares are owned by the United States. Amtrak's common stock shares are held by the Grand Truck Western Railroad Company, Burlington Northern Inc., The Penn Central Corporation, and Soo Line Railroad Company and Amtrak's common stock is not publicly traded.

Sincerely,

/s/ LORI B. WOLMETZ
Lori B. Wolmetz
(pending admission)

LBW:dp
31737

PLAINTIFF'S EXHIBIT 88

NATIONAL RAILROAD PASSENGER CORPORATION

1987 ANNUAL REPORT

FIVE-YEAR COMPARISON OF AMTRAK'S PERFORMANCE

Highlights

	1983	1984	1985	1986	**1987**
Revenues (millions)	$ 664.4	$ 758.8	$ 825.8	$ 861.4	**$ 973.5**
Expenses (millions)	$1,469.4	$1,522.1	$1,600.1	$1,563.6	**$1,672.0**
Revenue-to-Expense Ratio	.54	.56	.58	.62	**.65**
Revenue-to-Short-Term-Avoidable Cost Ratio*	.80	.85	.86	.96	**1.03**
Revenue-to-Long-Term-Avoidable Cost Ratio**	.68	.70	.71	.78	**.79**
Passenger Miles (millions)	4,246	4,552	4,825	5,013	**5,221**
Passenger Miles Per Train-Mile	145.8	157.1	159.0	172.2	**176.8**
Ridership (millions)					
System	19.0	19.9	20.8	20.3	**20.4**
Contract Commuter	.231***	.518	.587	.656	**10.2****
Systemwide On-Time Performance	82%	80%	81%	74%	**74%**

* Short-term avoidable costs—Costs of activities that would stop with the discontinuance of a route or train, or begin with the introduction of a new route or train. Such costs include train and engine crews, fuel and power, and maintenance of way.

** Long-term avoidable costs—All short-term avoidable costs, plus claims expenses, heavy maintenance and a portion of corporate and field overhead. Also included is a consideration of the effects route additions and deletions have on corporate costs over a period longer than one year.

*** Effective Jan. 1, 1983, Amtrak began providing commuter service under contract to the State of Maryland.

**** Effective Jan. 1, 1987, Amtrak began providing commuter service under contract to the Massachusetts Bay Transportation Authority.

* * *

Some Highlights of Amtrak's Year

* * *

Work continued in FY87 on the renewal of the 65-mile Atlantic City-Philadelphia line where Amtrak expects to be operating trains with push-pull equipment by 1989. Amtrak crews are replacing rail and ties, repairing or rebuilding bridges and grade crossings, and installing new traffic control systems. Of the $75 million renovation cost, $30 million will come from the Northeast Corridor Improvement Project (NECIP), and the remainder from the State of New Jersey and local government.

Another project with long-term implications for Amtrak is the West Side Connection—the rerouting of trains now using Grand Central Terminal in New York to take them down the west side of the city to Pennsylvania Station. This is an $85 million project, with Amtrak funding 60 percent of the cost. The remaining 40 percent will be funded by New York state. When completed in 1990, it will save Amtrak the cost of using Grand Central Terminal, and, most important, will enable us to open up new direct service between upper New York state and points along the Northeast Corridor.

* * *

Real estate revenues were about at last year's level—$24.1 million as compared with $25.5 million—but they are expected to increase substantially in FY88. Our Real Estate Department forecasts revenues will grow to a $50 million-a-year level in the next decade, primarily from some exciting development projects.

* * *

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

STATEMENT OF CHANGES IN CAPITALIZATION FOR THE YEARS ENDED SEPTEMBER 30, 1987 AND 1986

(THOUSANDS OF DOLLARS)

	Balance Sept. 30, 1985	Year Ended Sept. 30, 1986	Balance Sept. 30, 1986	**Year Ended Sept. 30, 1987**	**Balance Sept. 30, 1987**
Preferred stock issued to the Federal Government, $100 par value; 56,300,000 shares authorized and 48,864,029 shares outstanding in 1987; 50,000,000 shares authorized and 43,024,029 shares outstanding in 1986	$3,627,945	$674,458	$4,302,403	**$ 584,000**	**$4,886,403**
Common stock, $10 par value; 10,000,000 shares authorized, 9,385,694 shares outstanding	93,857	—	93,857	**—**	**93,857**
Other paid-in capital:					
Railroad capital payments	108,997	—	108,997	**—**	**108,997**
Federal and state capital payments	147,653	6,406	154,059	**6,909**	**160,968**
	256,650	6,406	263,056	**6,909**	**269,965**
Accumulated deficit before federal operating payments	(7,824,464)	(702,180)	(8,526,644)	**(698,515)**	**(9,225,159)**

	Balance Sept. 30 1985	Year Ended Sept. 30 1986	Balance Sept. 30 1986	**Year Ended Sept. 30 1987**	**Balance Sept. 30 1987**
Federal operating payments	4,046,592	—	4,046,592	**— 4,046,592**	
Accumulated deficit	(3,777,872)	(702,180)	(4,480,052)	**(698,515)**	**(5,178,567)**
Total capitalization	$ 200,580	$ (21,316)	$ 179,264	**$(107,606)**	**$ 71,658**

The accompanying notes are an integral part of this statement.

* * *

Form **1120** — Department of the Treasury, Internal Revenue Service

For calendar year 1989 or tax year beginning _____, 1989, ending _____, 19____

▶ Instructions are separate. See page 1 for Paperwork Reduction Act Notice.

1989

Check if a—
- A Consolidated return [X]
- B Personal holding co [ ]
- C Personal service corp (as defined in Temp Regs sec 1.441-4T—see instructions) [ ]

Use IRS label. Otherwise, please print or type.

HT 52-0910053 8912 S28 4000 M I
NATIONAL RAILROAD PASSENGER CORP R
8301 RRB NO S
400 N CAPITOL ST NW 8301 RRB NO 88
WASHINGTON DC 20001

D Employer identification number: 52-0910053

E Date incorporated: March 30, 1971

F Total assets (see Specific Instructions): $ 4,013,951,018

G Check applicable boxes: (1) [ ] Initial return (2) [ ] Final return (3) [ ] Change in address

Income	1a	Gross receipts or sales ____ b Less returns and allowances ____ c Bal ▶	1c	952,450,553
	2	Cost of goods sold and/or operations (Schedule A, line 7)	2	485,681,098
	3	Gross profit (line 1c less line 2)	3	466,769,455
	4	Dividends (Schedule C, line 19)	4	
	5	Interest	5	102,206,131
	6	Gross rents	6	43,487,542
	7	Gross royalties	7	
	8	Capital gain net income (attach Schedule D (Form 1120))	8	
	9	Net gain or (loss) from Form 4797, Part II, line 18 (attach Form 4797)	9	408,876
	10	Other income (see instructions—attach schedule)	10	258,736,229
	11	**Total** income—Add lines 3 through 10 ▶	11	871,608,233
Deductions (See instructions for limitations on deductions.)	12	Compensation of officers (Schedule E, line 4)	12	2,721,138
	13a	Salaries and wages ____ b Less jobs credit ____ c Balance ▶	13c	729,957,462
	14	Repairs	14	10,912,009
	15	Bad debts	15	1,956,438
	16	Rents	16	91,762,891
	17	Taxes	17	207,497,504
	18	Interest	18	3,541,795
	19	Contributions (see Instructions for 10% limitation)	19	
	20	Depreciation (attach Form 4562) 20: 147,791,630	21b	147,791,630
	21	Less depreciation claimed on Schedule A and elsewhere on return 21a:	22	
	22	Depletion	23	47,117,705
	23	Advertising	24	5,068,175
	24	Pension, profit-sharing, etc., plans	25	114,892,222
	25	Employee benefit programs	26	165,631,435
	26	Other deductions (attach schedule)	27	1,528,850,404
	27	**Total** deductions—Add lines 12 through 26 ▶	28	(657,242,171)
	28	Taxable income before net operating loss deduction and special deductions (line 11 less line 27)		
	29	**Less:** a Net operating loss deduction (see instructions) 29a: (5,728,793,963)	29c	(5,728,793,963)
		b Special deductions (Schedule C, line 20) 29b:		
Tax and Payments	30	Taxable income—Line 28 less line 29c	30	(6,386,036,134)
	31	**Total tax** (Schedule J, line 10)	31	None
	32	**Payments:** a 1988 overpayment credited to 1989 32a:		
		b 1989 estimated tax payments 32b:		
		c Less 1989 refund applied for on Form 4466 32c: ( ) d Bal ▶ 32d:		
		e Tax deposited with Form 7004 32e:		
		f Credit from regulated investment companies (attach Form 2439) 32f:		
		g Credit for Federal tax on fuels (attach Form 4136) 32g:	32h	
	33	Enter any **penalty** for underpayment of estimated tax—Check ▶ [ ] if Form 2220 is attached	33	
	34	**Tax due**—If the total of lines 31 and 33 is larger than line 32h, enter amount owed	34	None
	35	**Overpayment**—If line 32h is larger than the total of lines 31 and 33, enter amount overpaid	35	
	36	Enter amount of line 35 you want: **Credited to 1990 estimated tax** ▶ **Refunded** ▶	36	

Please Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Signature of officer ▶ _____ Date: 9/10/90 Title ▶ Treasurer

Paid Preparer's Use Only

Preparer's signature ▶ _____ Date _____ Check if self-employed [ ] Preparer's social security number _____

Firm's name (or yours if self-employed) and address ▶ _____ E.I. No ▶ _____ ZIP code ▶ _____

Routing No. 6113

PLAINTIFF'S EXHIBIT 90

PLAINTIFF'S EXHIBIT 90

J.A. 598

Schedule A Cost of Goods Sold and/or Operations (See instructions for line 2, page 1.)

1	Inventory at beginning of year	1	
2	Purchases	2	
3	Cost of labor . . . See Attached Schedule	3	
4a	Additional section 263A costs (see instructions—attach schedule)	4a	
b	Other costs (attach schedule)	4b	
5	Total—Add lines 1 through 4b	5	
6	Inventory at end of year	6	
7	Cost of goods sold and/or operations—Line 5 less line 6. Enter here and on line 2, page 1	7	

8a Check all methods used for valuing closing inventory:

(i) ☐ Cost (ii) ☐ Lower of cost or market as described in Regulations section 1.471-4 (see instructions)

(iii) ☐ Writedown of "subnormal" goods as described in Regulations section 1.471-2(c) (see instructions)

(iv) ☐ Other (Specify method used and attach explanation.) ▶

b Check if the LIFO inventory method was adopted this tax year for any goods (if checked, attach Form 970) . . . ☐

c If the LIFO inventory method was used for this tax year, enter percentage (or amounts) of closing inventory computed under LIFO . . . 8c

d Do the rules of section 263A (with respect to property produced or acquired for resale) apply to the corporation? ☐ Yes ☐ No

e Was there any change in determining quantities, cost, or valuations between opening and closing inventory? If "Yes," attach explanation ☐ Yes ☐ No

Schedule C Dividends and Special Deductions (See instructions.)

	(a) Dividends received	(b) %	(c) Special deductions (a) × (b)
1 Dividends from less-than-20%-owned domestic corporations that are subject to the 70% deduction (other than debt-financed stock)		70	
2 Dividends from 20%-or-more-owned domestic corporations that are subject to the 80% deduction (other than debt-financed stock)		80	
3 Dividends on debt-financed stock of domestic and foreign corporations (section 246A)		see instructions	
4 Dividends on certain preferred stock of less-than-20%-owned public utilities		41.176	
5 Dividends on certain preferred stock of 20%-or-more-owned public utilities		47.059	
6 Dividends from less-than-20%-owned foreign corporations and certain FSCs that are subject to the 70% deduction		70	
7 Dividends from 20%-or-more-owned foreign corporations and certain FSCs that are subject to the 80% deduction		80	
8 Dividends from wholly owned foreign subsidiaries subject to the 100% deduction (section 245(b))		100	
9 Total—Add lines 1 through 8. See instructions for limitation			
10 Dividends from domestic corporations received by a small business investment company operating under the Small Business Investment Act of 1958		100	
11 Dividends from certain FSCs that are subject to the 100% deduction (section 245(c)(1))		100	
12 Dividends from affiliated group members subject to the 100% deduction (section 243(a)(3))		100	
13 Other dividends from foreign corporations not included on lines 3, 6, 7, 8, or 11			
14 Income from controlled foreign corporations under subpart F (attach Forms 5471)			
15 Foreign dividend gross-up (section 78)			
16 IC-DISC and former DISC dividends not included on lines 1, 2, or 3 (section 246(d))			
17 Other dividends			
18 Deduction for dividends paid on certain preferred stock of public utilities (see instructions)			
19 Total dividends—Add lines 1 through 17. Enter here and on line 4, page 1. ▶			
20 Total deductions—Add lines 9, 10, 11, 12, and 18. Enter here and on line 29b, page 1 . . . ▶			

Schedule E Compensation of Officers (See instructions for line 12, page 1.)

Complete Schedule E only if total receipts (line 1a, plus lines 4 through 10, of page 1, Form 1120) are $500,000 or more.

(a) Name of officer	(b) Social security number	(c) Percent of time devoted to business	Percent of corporation stock owned (d) Common	(e) Preferred	(f) Amount of compensation
1 See Attached Schedule		%	%	%	
		%	%	%	
		%	%	%	
		%	%	%	
		%	%	%	

2 Total compensation of officers

3 Less: Compensation of officers claimed on Schedule A and elsewhere on return ( )

4 Compensation of officers deducted on line 12, page 1

Schedule J **Tax Computation**

1	Check if you are a member of a controlled group (see sections 1561 and 1563) ▶ ☐		
2	If the box on line 1 is checked:		
a	Enter your share of the $50,000 and $25,000 taxable income bracket amounts (in that order): (i) $ (ii) $		
b	Enter your share of the additional 5% tax (not to exceed $11,750) ▶ $		
3	Income tax (see instructions to figure the tax). Check this box if the corporation is a qualified personal service corporation (see instructions). ▶ ☐		3
4a	Foreign tax credit (attach Form 1118)	4a	
b	Possessions tax credit (attach Form 5735)	4b	
c	Orphan drug credit (attach Form 6765)	4c	
d	Credit for fuel produced from a nonconventional source (see instructions)	4d	
e	General business credit. Enter here and check which forms are attached: ☐ Form 3800 ☐ Form 3468 ☐ Form 5884 ☐ Form 6478 ☐ Form 6765 ☐ Form 8586	4e	
f	Credit for prior year minimum tax (attach Form 8801)	4f	
5	Total—Add lines 4a through 4f		5
6	Line 3 less line 5		6
7	Personal holding company tax (attach Schedule PH (Form 1120))		7
8	Recapture taxes. Check if from: ☐ Form 4255 ☐ Form 8611		8
9a	Alternative minimum tax (attach Form 4626)		9a
b	Environmental tax (attach Form 4626)		9b
10	Total tax—Add lines 6 through 9b. Enter here and on line 31, page 1		10 None

Additional Information (See instruction F.)

		Yes	No
H	Refer to the list in the instructions and state the principal:		
	(1) Business activity code no. ▶ 4000		
	(2) Business activity ▶ Transportation		
	(3) Product or service ▶ Rail Passenger Service		
I	(1) Did the corporation at the end of the tax year own, directly or indirectly, 50% or more of the voting stock of a domestic corporation? (For rules of attribution, see section 267(c).) If "Yes," attach a schedule showing: (a) name, address, and identifying number, (b) percentage owned, and (c) taxable income or (loss) before NOL and special deductions of such corporation for the tax year ending with or within your tax year.		X
	(2) Did any individual, partnership, corporation, estate, or trust at the end of the tax year own, directly or indirectly, 50% or more of the corporation's voting stock? (For rules of attribution, see section 267(c).) If "Yes," complete (a) through (c)		X
	(a) Attach a schedule showing name, address, and identifying number.		
	(b) Enter percentage owned ▶		
	(c) Was the owner of such voting stock a person other than a U.S. person? (See instructions.) **Note:** *If "Yes," the corporation may have to file Form 5472.*		
	If "Yes," enter owner's country ▶		
J	Was the corporation a U.S. shareholder of any controlled foreign corporation? (See sections 951 and 957.) If "Yes," attach Form 5471 for each such corporation		X
K	At any time during the tax year, did the corporation have an interest in or a signature or other authority over a financial account in a foreign country (such as a bank account, securities account, or other financial account)? (See instruction F and filing requirements for form TD F 90-22.1.) If "Yes," enter name of foreign country ▶ Canada	X	
L	Was the corporation the grantor of, or transferor to, a foreign trust that existed during the current tax year, whether or not the corporation has any beneficial interest in it? If "Yes," the corporation may have to file Forms 3520, 3520-A, or 926.		X
M	During this tax year, did the corporation pay dividends (other than stock dividends and distributions in exchange for stock) in excess of the corporation's current and accumulated earnings and profits? (See sections 301 and 316.) If "Yes," file Form 5452. If this is a consolidated return, answer here for parent corporation and on Form 851, Affiliations Schedule, for each subsidiary.		X
N	During this tax year, did the corporation maintain any part of its accounting/tax records on a computerized system?	X	
O	Check method of accounting: (1) ☐ Cash (2) ☒ Accrual (3) ☐ Other (specify) ▶		
P	Check this box if the corporation issued publicly offered debt instruments with original issue discount ☐ If so, the corporation may have to file Form 8281.		
Q	Enter the amount of tax-exempt interest received or accrued during the tax year ▶ $		
R	Enter the number of shareholders at the end of the tax year if there were 35 or fewer shareholders ▶		

Schedule L Balance Sheets

Assets	Beginning of tax year (a)	Beginning of tax year (b)	End of tax year (c)	End of tax year (d)
1 Cash				
2a Trade notes and accounts receivable				
b Less allowance for bad debts				
3 Inventories				
4 U.S. government obligations				
5 Tax-exempt securities (see instructions)				
6 Other current assets (attach schedule)				
7 Loans to stockholders				
8 Mortgage and real estate loans				
9 Other investments (attach schedule)				
10a Buildings and other depreciable assets				
b Less accumulated depreciation	See attached	schedule		
11a Depletable assets				
b Less accumulated depletion				
12 Land (net of any amortization)				
13a Intangible assets (amortizable only)				
b Less accumulated amortization				
14 Other assets (attach schedule)				
15 Total assets				
Liabilities and Stockholders' Equity				
16 Accounts payable				
17 Mortgages, notes, bonds payable in less than 1 year				
18 Other current liabilities (attach schedule)				
19 Loans from stockholders				
20 Mortgages, notes, bonds payable in 1 year or more				
21 Other liabilities (attach schedule)				
22 Capital stock: a Preferred stock				
b Common stock				
23 Paid-in or capital surplus				
24 Retained earnings—Appropriated (attach schedule)				
25 Retained earnings—Unappropriated				
26 Less cost of treasury stock		( )		( )
27 Total liabilities and stockholders' equity				

Schedule M-1 **Reconciliation of Income per Books With Income per Return** (You are not required to complete this schedule if the total assets on line 15, column (d), of Schedule L are less than $25,000.)

1 Net income per books		7 Income recorded on books this year not included on this return (itemize):	
2 Federal income tax		a Tax-exempt interest $	
3 Excess of capital losses over capital gains			
4 Income subject to tax not recorded on books this year (itemize): See Attached Schedule			
5 Expenses recorded on books this year not deducted on this return (itemize):		8 Deductions on this return not charged against book income this year (itemize):	
a Depreciation $		a Depreciation $	
b Contributions carryover $		b Contributions carryover $	
c Travel and entertainment $			
6 Total of lines 1 through 5		9 Total of lines 7 and 8	
		10 Income (line 28, page 1)—line 6 less line 9	

Schedule M-2 **Analysis of Unappropriated Retained Earnings per Books (line 25, Schedule L)** (You are not required to complete this schedule if the total assets on line 15, column (d), of Schedule L are less than $25,000.)

1 Balance at beginning of year	(5,995,654,290)	5 Distributions: a Cash	
2 Net income per books	(680,641,395)	b Stock	
3 Other increases (itemize):		c Property	
		6 Other decreases (itemize):	
4 Total of lines 1, 2, and 3	(6,676,295,685)	7 Total of lines 5 and 6	
		8 Balance at end of year (line 4 less line 7)	(6,676,295,685)

J.A. 602

PLAINTIFF'S EXHIBIT 95

NATIONAL RAILROAD PASSENGER CORPORATION

1989 ANNUAL REPORT

FIVE-YEAR COMPARISON OF AMTRAK'S PERFORMANCE

	1989	1988	1987	1986	1985
Revenues (millions)	**$1,269.1**	$1,106.7	$ 973.5	$ 861.4	$ 825.8
Expenses (millions)	**$1,934.5**	$1,757.1	$1,672.0	$1,563.6	$1,600.1
Revenue-to-Expense Ratio	**.72**	.69	.65	.62	.58
Revenue-to-Short-Term-Avoidable Cost Ratio*	**1.20**	1.15	1.03	.96	.86
Revenue-to-Short-Term-Avoidable Cost Ratio**	**.91**	.90	.79	.78	.71
Passenger Miles (millions)***	**5,859**	5,678	5,221	5,013	4,825
Passenger Miles Per Train-Mile***	**188.4**	188.3	176.8	172.2	159.0
Ridership (millions)					
System	**21.4**	21.5	20.4	20.3	20.8
Contract Commuter	**17.4**	15.4	10.2****	.656	.587
Systemwide On-Time Performance	**75%**	71%	74%	74%	81%

* Short-term avoidable costs—Costs of activities that would stop with the discontinuance of a route or train, or begin with the introduction of a new route or train. Such costs include train and engine crews, fuel and power, and maintenance of way.

** Long-term avoidable costs—All short-term avoidable costs, plus claims expenses, heavy maintenance and a portion of corporate and field overhead.

*** Contract commuter passengers not included.

**** Effective Jan. 1, 1987, Amtrak began providing commuter service under contract to the Massachusetts Bay Transportation Authority.

* * *

PRESIDENT'S LETTER

* * *

Our equipment shortage, particularly sleeping cars and locomotives, is an issue that must be addressed if we are to continue to improve financially. Amtrak is seeking both private and public funds with which to finance the equipment we need to meet the existing and future demand for Amtrak service during the next decade and century beyond. Our private financing this past year of 104 new short-distance coaches—Amtrak's first major acquisition of cars without federal assistance—reflects positively on the confidence of the private sector in Amtrak and the future of rail passenger service in this country.

* * *

Third, we want to expand Amtrak's successful contract operation of state or regionally supported commuter rail systems. Amtrak already operates under contract several commuter rail systems, including Boston's large MBTA commuter service, and we believe that this business will grow significantly as communities seek to reduce the highway commuter congestion that is clogging travel to our major cities. Amtrak is the nation's expert in this area, with the efficiencies of a national organization and nearly 20 years of experience behind it. We are eager to obtain contracts to operate every new commuter rail system that comes on line, as well as compete to operate existing systems.

* * *

/s/ W GRAHAM CLAYTOR, JR.
W. Graham Claytor, Jr.
President
December 1989

* * *

REVENUE FROM A VARIETY OF SOURCES

Revenue generated from other aspects of Amtrak's business, including real estate development, mail and express, and other revenue enhancement projects, continued to grow and contribute to the Corporation's bottom line.

Amtrak's operation of the Boston-area MBTA commuter system has proved extremely successful, generating a modest return for the Corporation as well as further establishing Amtrak's credentials as a commuter railroad operator. On-time performance for the MBTA trains during 1989 was a high 94 percent, entitling Amtrak to earn additional incentive payments. Amtrak also operates a major part of the Baltimore-to-Washington commuter system for the state of Maryland and has contracted to operate a commuter service between Northern Virginia and Washington, D.C., which will begin as soon as equipment can be obtained.

Revenues from mail and express reached $37 million, up 6 percent over last year. This should grow considerably in FY 1990 as recently acquired mail handling cars are phased into the system. Importantly, revenues generated by mail and express can help offset the operating losses associated with the start-up of new passenger routes and can be a key factor in the decision to initiate a new service.

Real estate revenues from development of the Corporation's properties continue to grow and after many years of planning, several important developments are progressing. Revenues for FY 1989 reached $43 million, a 40 percent improvement over last year, principally due to the sale of a maintenance facility in New Haven. In Philadelphia, development of office and retail space within Amtrak's 30th Street Station, as well as improvements to the passenger facilities, are proceeding. Plans are underway for development of up to 30 million square feet of residential, office and commercial development of the adjacent 60 acres. Construction should start within a few years and could continue for 20 years or more. Work also continues at Chicago Union Station, where major improvements are being made to all passenger facilities. Plans are moving ahead for renovation of the headhouse building by a private real estate development firm at a cost of $270 million to be obtained through private funding. Upon completion, Amtrak will receive the benefits of a modern station facility and annual rental revenues in excess of $4 million.

Work at Amtrak's New York Pennsylvania Station is nearing completion after several years of construction to improve the station's passenger and commercial facilities. Ticket counters and waiting areas have been modernized and significantly expanded, providing a vastly more organized and hospitable passenger flow for the 121,000 intercity and commuter riders who daily catch Amtrak and New Jersey Transit trains at the station. In addition, some 35,000 square feet in new retail space soon will be provided.

Corporate development activities also generated significantly improved revenues—$18.3 million versus $16.3 million last year—and contributed more than $6.5 million to Amtrak's capital program. Activities include the leasing of Amtrak's railroad right-of-way to run fiber optic communication lines, provision of track services to other railroads, a cogeneration facility in New Haven, and assembly of new light rail cars for the Southeastern Pennsylvania Transportation Authority (SEPTA).

* * *

NEW SERVICE TO NEW MARKETS

* * *

State and local interest in providing an alternative to congested highways and airports has sparked enormous interest in new Amtrak service in various areas of the country, and Amtrak is working closely with federal, state and local officials to explore the funding of new routes. New service, financially supported by states under the "403(b)" program, was started in October 1989 between Chicago and Milwaukee,

and between Birmingham and Mobile; a third *San Joaquin* train between Bakersfield and Oakland was added in December 1989. Discussions continue on adding service between Raleigh and Charlotte, and an additional San Diego-to-Santa Barbara train. Amtrak has been requested to study the equipment needs and feasibility of other new services—including service through Oklahoma, between Seattle and Vancouver, and between Chicago and Florida—as well as to consider operating its remaining tri-weekly services on a daily basis.

* * *

POISED FOR THE FUTURE

* * *

With adequate capital to acquire new Superliner and Viewliner cars and new locomotives, Amtrak can add trains to existing routes and initiate new routes where economically justified, and work together with state and local governments to jointly provide an energy efficient, environmentally benign alternative to congested highways and airports.

An important example of this effort is the close cooperation between Amtrak and the Coalition of Northeastern Governors (CONEG) to identify the capital improvements necessary to reduce running time between New York and Boston from the current four hours and 30 minutes to under three hours. Faster service would enable Amtrak to capture a larger share of the New York-Boston business market, producing substantial incremental revenues for the Corporation as well as significantly reducing congestion at Boston's Logan airport, New York's airports, and along the crowded interstate highway system linking southern New England. Amtrak, CONEG and federal officials are now exploring options for funding these important improvements.

Considerable efforts also are underway in California to identify ways in which intercity and commuter rail service

can reduce congestion and automobile pollution. A joint rail replacement program funded by Amtrak; the state of California; the Santa Fe Railway; and Los Angeles, Orange and San Diego counties, is underway to enhance service along the crowded San Diego-Los Angeles corridor. Amtrak already provides eight daily round trips along the corridor and the State is interested in at least two additional trips. San Diego County and Orange County also are exploring commuter service along the route. A similar expansion of service is being studied on the *San Joaquin* route between Bakersfield and Oakland. Significant state supported rail infrastructure improvement projects also are underway in Michigan, Wisconsin, Illinois and New York.

* * *

National Railroad Passenger Corporation and Subsidiaries (Amtrak)

CONSOLIDATED STATEMENTS OF CHANGES IN CAPITALIZATION

FOR THE YEARS ENDED SEPTEMBER 30, 1989 AND 1988
(THOUSANDS OF DOLLARS)

	Preferred stock	Common stock	Other paid-in capital	Accumulated deficit	Totals
Balance at September 30, 1987	$ 4,886,403	$ 93,857	$ 3,610,205	$ (5,178,567)	$3,441,898
Issuance of preferred stock	590,300	—	—	—	590,300
Federal paid-in capital	—	—	50,473	—	50,473
Federal and state capital payments	—	—	3,766	—	3,766
Net loss	—	—	—	(650,356)	(650,356)
Balance at September 30, 1988	5,476,703	93,857	3,664,444	(5,828,923)	3,406,081
Issuance of preferred stock	579,300	—	—	—	579,300
Federal paid-in capital	—	—	39,433	—	39,433
Federal and state capital payments	—	—	7,548	—	7,548
Net loss	—	—	—	(665,473)	(665,473)
Balance at September 30, 1989	**$6,056,003**	**$93,857**	**$3,711,425**	**$(6,494,396)**	**$3,366,889**

The accompanying notes are an integral part of these consolidated statements.

September 30, 1989 and 1988

NOTE 1: SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

Principles of Consolidation

The financial statements reflect the consolidated operations of the National Railroad Passenger Corporation and its wholly-owned subsidiaries, Chicago Union Station Company and Washington Terminal Company. All significant intercompany transactions have been eliminated. Certain reclassifications have been made to the prior year's statements to confirm with the 1989 presentation.

Passenger Related Revenue

Passenger fares are recognized as operating revenues when the related transportation services are furnished. Tickets which have been sold but not used, are classified as deferred ticket revenues, and are included in the Consolidated Balance Sheets under "Accrued expenses and other current liabilities."

Contracted Services Revenue

The Consolidated Statements of Operations include the gross revenues earned and expenses incurred under various arrangements to provide access to the Northeast Corridor, and to perform services for freight railroads and commuter agencies that provide rail services along the Northeast Corridor.

Cash Equivalents

Amtrak considers all financial instruments purchased having a maturity of three months or less to be cash equivalents. Those financial instruments purchased with a maturity of over three months, and which mature not more than one year from the Consolidated Balance Sheet date, are classified as short-term cash investments.

Property and Depreciation

Property and equipment are stated at cost, and are depreciated using the composite straight-line method over their estimated useful lives. Certain major items of property acquired through capital lease agreements are recorded as assets and are amortized over the shorter of their estimated useful lives or the lease term.

Casualty Losses

Provision is made for Amtrak's portion of the estimated liability for unsettled casualty and accident claims. The current portion of this liability is included in the Consolidated Balance Sheets under "Accrued expenses and other current liabilities." The non-current portion is classified as "Casualty reserves." As of September 30, 1989 and 1988, the current claims liability included in accrued expenses and other current liabilities was $46,200,000 and $41,500,000, respectively.

NOTE 2: FEDERAL AND STATE FUNDING

Funds are provided to Amtrak though federal and state payments for operations and for capital acquisitions and improvements. For funds received from the Federal Government, Section 304 of the Rail Passenger Service Act (45 U.S.C. 544) requires Amtrak to issue to the United States Secretary of Transportation preferred stock equal in par value to all federal operating payments and most federal capital payments received subsequent to October 1, 1981, as well as capital and certain operating payments received prior to that date.

Public Law 101-239, approved on December 19, 1989, provides $604,700,000 in federal funds to Amtrak for Fiscal Year 1990 (unaudited—subsequent to date of auditors' report).

Federal paid-in capital, included in the Consolidated Statements of Changes in Capitalization, reflects certain funding received from the Federal Government to finance acquisition of and improvements to property and equipment. In

exchange for these funds, Amtrak issued two promissory notes to the United States. The first note matures on December 31, 2975, and is secured by Amtrak's real property. The second note matures on November 1, 2082, with successive 99-year renewal terms, and is secured by Amtrak's equipment and certain rolling stock. Neither of the notes bears interest, unless prepaid (which Amtrak does not intend to do). The Federal Government's security interest in Amtrak's real property, equipment, and rolling stock entitles it to repayment plus interest in the event Amtrak ceases operations, is acquired by another entity, or seeks relief under bankruptcy or insolvency laws.

NOTE 3: PREFERRED AND COMMON STOCK

At September 30, 1989, 68,400,000 shares of $100 par value preferred stock were authorized, of which 60,560,029 shares were issued and outstanding. On November 1, 1989, 440,587 shares of preferred stock were issued at par value, increasing the total number of shares issued and outstanding to 61,000,616. At September 30, 1988, 56,300,000 shares were authorized, of which 54, 767, 029 shares were issued and outstanding. All issued and outstanding preferred shares are held by the Secretary of Transportation for the benefit of the United States Government. Dividends are to be fixed at a rate not less than 6% per annum and are cumulative so that no dividends may be paid on the common shares prior to the payment of all accrued but unpaid dividends on the preferred shares. No dividends have been declared. Preferred stockholders are also entitled to a liquidation preference over common shares involving a payment of not less than par value plus all accrued unpaid dividends. Each share of preferred stock is convertable into 10 shares of common stock at the option of the preferred stockholder.

At September 30, 1989 and 1988, 10,000,000 shares of $10 par value common stock were authorized, of which 9, 385,694 shares were issued and outstanding.

* * *

PLAINTIFF'S EXHIBIT 96

NATIONAL RAILROAD
PASSENGER CORPORATION

1988 ANNUAL REPORT

* * *

FIVE-YEAR COMPARISON OF AMTRAK'S PERFORMANCE

	1984	1985	1986	1987	**1988**
Revenues (millions)	$ 758.8	$ 825.8	$ 861.4	$ 973.5	**$1,106.7**
Expenses (millions)	$1,552.1	$1,600.1	$1,563.6	$1,672.0	**$1,757.1**
Revenue-to Expense Ratio	.56	.58	.62	.65	**.69**
Revenue-to-Short-Term Avoidable Cost Ratio*	.85	.86	.96	1.03	**1.15**
Revenue-to-Long-Term Avoidable Cost Ratio**	.70	.71	.78	.79	**.90**
Passenger Miles (millions)***	4,552	4,825	5,013	5,221	**5,678**
Passenger Miles Per Train-Mile***	157.1	159.0	172.2	176.8	**188.3**
Ridership (millions)					
System	19.9	20.8	20.3	20.4	**21.5**
Contract Commuter	.518	.587	.656	10.2****	**15.4**
Systemwide On-Time Performance	80%	81%	74%	74%	**71%**

* Short-term avoidable costs—Costs of activities that would stop with the discontinuance of a route or train, or begin with the introduction of a new route or train. Such costs include train and engine crews, fuel and power, and maintenance of way.

** Long-term avoidable costs—All short-term avoidable costs, plus claims expenses, heavy maintenance and a portion of corporate and field overhead.

*** Contract commuter passengers not included.

**** Effective Jan. 1, 1987, Amtrak began providing commuter service under contract to the Massachusetts Bay Transportation Authority.

THE PRESIDENT'S LETTER

* * *

Adequate capital investment is vital to Amtrak's future. Although Amtrak is able to fund some of its critical capital needs through its corporate development and real estate activities, a larger and more consistent source of capital funding is needed now and will be needed even more in the years just ahead when aging locomotives and cars must be replaced. A transportation trust fund, funded through the gasoline tax—to which Amtrak as well as highway builders and mass transit agencies would have access—offers the most promising source of the capital we need if Amtrak is to remain a reliable, marketable alternative to highway and air congestion.

* * *

/s/ W GRAHAM CLAYTOR, JR.
W. Graham Claytor, Jr.
President
December 31, 1988

* * *

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

STATEMENT OF CHANGES IN CAPITALIZATION FOR THE YEARS ENDED SEPTEMBER 30, 1988 AND 1987

(THOUSANDS OF DOLLARS)

	Balance Sept. 30, 1986	Year Ended Sept. 30, 1987	Balance Sept. 30, 1987	**Year Ended Sept. 30, 1988**	**Balance Sept. 30, 1988**
Preferred stock issued to the Federal Government, $100 par value; 56,300,000 shares authorized (an additional 5,900,000 shares were authorized subsequent to September 30, 1988, increasing the number of authorized shares to 62,200,000); 54,767,029 shares outstanding in 1988 and 48,864,029 shares outstanding in 1987	$ 4,302,403	$ 584,000	$ 4,886,403	**$ 590,300**	**$ 5,476,703**
Common stock, $10 par value; 10,000,000 shares authorized, 9,385,694 shares outstanding	93,857	—	93,857	—	**93,857**
Other paid-in capital:					
Federal paid-in capital	3,248,415	91,825	3,340,240	**50,473**	**3,390,713**
Railroad capital payments	108,997	—	108,997	—	**108,997**

	Balance Sept. 30, 1986	Year Ended Sept. 30,' 1987	Balance Sept. 30, 1988	**Year Ended Sept. 30, 1988**	**Balance Sept. 30, 1988**
Federal and state capital payments	154,059	6,909	160,968	**3,766**	**164,734**
	3,511,471	98,734	3,610,205	**54,239**	**3,664,444**
Accumulated deficit before federal operating payments	(8,526,644)	(698,515)	(9,225,159)	**(650,356)**	**(9,875,515)**
Federal operating payments	4,046,592	—	4,046,592	—	**4,046,592**
Accumulated deficit	(4,480,052)	(698,515)	(5,178,567)	**(650,356)**	**(5,828,923)**
Total capitalization	$ 3,427,679	$ (15,781)	$ 3,411,898	**$ (5,817)**	**$ 3,406,081**

The accompanying notes are an integral part of these statements.

PLAINTIFF'S EXHIBIT 97

NATIONAL RAILROAD
PASSENGER CORPORATION

1986 ANNUAL REPORT

THE PRESIDENT'S REPORT

In many ways, fiscal year 1986 (FY86) was one of Amtrak's most successful years. Certainly that was true of the corporation's financial performance, achieved as it was in a highly competitive market complicated by decreases in gasoline prices. Through it all Amtrak kept a keen eye on the bottom line and displayed an overriding concern for improving service, increasing revenues and controlling costs.

* * *

In spite of this progress, of the $587 million of federal support received for its operations in FY86, $242 million was required to cover direct and indirect operating costs of the Northeast Corridor, and $345 million was required for operating the rest of the system. No rail passenger system in the world is able to operate at a profit, and Amtrak is no exception.

* * *

Amtrak's federal funding, although authorized through FY87 and FY88, is still subject to the appropriations process and budget constraints. The same legislation that authorized our funding also presented us with some new opportunities to improve our bottom line and we intend to make the most of them.

* * *

/s/ W GRAHAM CLAYTOR, JR.
W. Graham Claytor, Jr.
President
December 31, 1986

HIGHLIGHTS OF AMTRAK'S 1986 PERFORMANCE

FIVE-YEAR COMPARISON OF AMTRAK'S PERFORMANCE

	1982	1983	1984	1985	**1986**
Operating Revenues (millions)	$ 630.7	$ 664.4	$ 758.8	$ 825.8	**$ 861.4**
Operating Expenses (millions)	$1,280.6	$1,349.5	$1,485.2	$1,566.1	**$1,530.2**
Revenue-to-Expense Ratio	.53	.54	.56	.58	**.62**
Revenue-to-Short-Term-Avoidable Cost Ratio*	.77	.80	.85	.86	**.96**
Revenue-to-Long-Term Avoidable Cost Ratio**	.64	.68	.70	.71	**.78**
Passenger Miles (millions)	4,172	4,246	4,552	4,825	**5,012**
Passenger Miles Per Train-Mile	145.6	145.8	157.1	159.0	**172.2**
Ridership					
System (millions)	19.0	19.0	19.9	20.8	**20.3**
Contract Commuter (thousands)	—	231***	518	587	**656**
Systemwide On-Time Performance	79%	82%	80%	81%	**74%**

* Short-term avoidable costs—Costs of activities that would stop with the discontinuance of a route or train, or begin with the introduction of a new route or train. Such costs include train and engine crews, fuel and power; and maintenance of way.

** Long-term avoidable costs—All short-term avoidable costs, plus claims expenses, heavy maintenance and a portion of corporate and field overhead. Also included is a consideration of the effects route additions and deletions have on corporate costs over a period longer than one year.

*** Effective Jan. 1, 1983, Amtrak began providing commuter service under contract to the state of Maryland.

AMTRAK ON THE UPGRADE

* * *

A slight decrease in the number of riders reflects a conscious decision we made to lower our operating costs by operating fewer trains used primarily by commuters, all of which require very heavy subsidies. Due to this restructuring in some of our services, we estimate that we are no longer carrying some 600,000 to 700,000 commuters, primarily in the Northeast. This was one of the steps we had to take to live within a reduced federal grant.

Another step which affected ridership was changing three of our long-distance trains from daily to tri-weekly operation during the off-peak winter season. Savings on the *Pioneer* route were substantial; however, savings on the *Palmetto* and *Crescent* routes were not as much as we anticipated. Nevertheless, we were determined to maintain some level of service on all of our routes.

On the other hand, without adversely affecting our need for federal subsidies, Amtrak was able to add service between New York City and Cape Cod on summer weekends as a result of a contract with the commonwealth of Massachusetts.

* * *

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

STATEMENT OF CHANGES IN CAPITALIZATION FOR THE YEARS ENDED SEPTEMBER 30, 1986 AND 1985

(THOUSANDS OF DOLLARS)

	Balance Sept. 30, 1984	Year Ended Sept. 30, 1983	Balance Sept. 30, 1985	**Year Ended Sept. 30, 1986**	**Balance Sept. 30, 1986**
Preferred stock issued to the Federal Government, $100 par value; 50,000,000 shares authorized, 43,024,029 shares outstanding in 1986 and 36,279,449 shares outstanding in 1985	$2,883,544	$744,401	$3,627,945	**$674,458**	**$4,302,403**
Common stock, $10 par value; 10,000,000 shares authorized, 9,385,694 shares outstanding	93,857	—	93,857	—	**93,857**
Other paid-in capital:					
Railroad capital payments					
Federal and state capital payments	108,997	—	108,997	—	**108,997**
	128,924	18,729	147,653	**6,406**	**154,059**
	237,921	18,729	256,650	**6,406**	**263,056**
Accumulated deficit before federal operating payments	(7,050,119)	(774,345)	(7,824,464)	**(702,180)**	**(8,526,644)**
Federal operating payments	4,046,592	—	4,046,592	—	**4,046,592**

	Balance Sept. 30, 1984	Year Ended Sept. 30, 1983	Balance Sept. 30, 1985	**Year Ended Sept. 30, 1986**	**Balance Sept. 30, 1986**
Accumulated deficit	(3,003,527)	(774,345)	(3,777,872)	**(702,180)**	**(4,480,052)**
Total capitalization	$211,795	$(11,215)	$200,580	**$(21,316)**	**$ 179,264**

The accompanying notes are an integral part of this statement.

PLAINTIFF'S EXHIBIT 98

BYLAWS

of

NATIONAL RAILROAD PASSENGER CORPORATION

(Updated Through January 1984)

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APPENDIX A (to the Corporation's Bylaws)

Open Meetings of the Board of Directors of the Corporation

BYLAWS

of

NATIONAL RAILROAD PASSENGER CORPORATION

ARTICLE I

General Provisions

Section 1.01. Rules of Construction.

For the purposes of these Bylaws, words importing the masculine gender include the feminine as well.

The word "person" includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

ARTICLE II

Offices

Section 2.01. Registered Office.

The registered office of the Corporation shall be in the District of Columbia.

Section 2.02. Other Offices.

The Corporation may also have offices at such other places, either within or without the District of Columbia, as the Board of Directors may from time to time authorize.

ARTICLE III

Shareholders

Section 3.01. Meetings.

Annual and special meetings of the shareholders shall be held at the Corporation's principal place of business in the District of Columbia or at such other place within or without the District of Columbia as may be designated in the notice of the meeting.

Section 3.02. Annual Meeting.

The annual meeting of the shareholders for the election of Directors shall be held at 2:00 P.M. local time at the place of meeting on the fourth Thursday in the fourth month after the close of each fiscal year commencing in 1972, or if that day shall be a holiday at the place of the meeting, then on the next succeeding business day. Failure to hold the annual meeting at the designated time shall not work any forfeiture or dissolution of the Corporation.

Section 3.03. Special Meetings.

Special meetings of the shareholders may be called by the Board of Directors, the Chairman of the Board, the President, the Secretary, or the holders of not less than one-fifth of all of the shares of the Corporation outstanding and entitled to vote at such meeting. Upon request in writing delivered either in person or by registered mail to the President or Secretary of the Corporation by any person or persons entitled to call a meeting of shareholders, such officer shall cause to be given, to the shareholders entitled thereto, notice of a meeting to be held not less than ten nor more than fifty days after the receipt of such request, as such officer shall fix. If such notice is not given within twenty days after the delivery or mailing of such request, the person or persons calling the meeting may fix the time of the meeting and give, or cause to be given, notice in the manner hereinafter provided.

Section 3.04. Adjournments.

Any annual or special meeting of shareholders may be adjourned from time to time by a majority of the votes of the shareholders present in person or represented by proxy at the meeting and entitled to vote thereat, whether or not a quorum be present, provided that any meeting at which Directors are to be elected shall be adjourned as provided in Section 3.11 of these Bylaws.

Section 3.05. Notice or Waiver of Notice.

Except as hereinafter otherwise provided, notice of each meeting of shareholders, whether annual or special, shall be given to each shareholder of record entitled to vote at such meeting by delivering a written or printed notice thereof to him personally or by mailing or telegraphing such notice to him, charges prepaid, addressed to him at his address as it appears on the books of the Corporation, not less than ten days and not more than fifty days before the day on which the meeting is to be held. Every such notice shall state the place, day and hour of the meeting and, in the case of special meetings, the purpose of the meeting. Attendance by any shareholder, in person or by proxy, at any meeting of which he is entitled to notice shall constitute a waiver by him of notice of such meeting except where such attendance is for the express purpose of objecting to the transaction of any business because the meeting was not lawfully called or convened. A written waiver of notice of any meeting signed by a person entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to giving of such notice to such person. When a meeting is adjourned, it shall not be necessary, except when required by law, to give any notice of the adjourned meeting or of the business to be transacted thereat otherwise than by announcement at the meeting at which such adjournment is taken.

Section 3.06. Quorum.

A shareholders' meeting shall not be organized for the transaction of business unless a quorum is present. The presence in person or by proxy of the holders of a majority of the outstanding shares of the Corporation entitled to vote shall be necessary to, and shall constitute, a quorum, except that for the election of Directors the provisions of Section 3.11 of these Bylaws shall govern; provided that if a quorum is found to exist at any duly organized meeting, a quorum shall be deemed to continue to exist until final adjournment of such meeting, whether on the same day or a later day, notwithstanding the withdrawal of the holders of enough shares to leave less than the number necessary to constitute a quorum.

Section 3.07. Organization.

At each meeting of the shareholders a chairman chosen by a majority of the votes of the shareholders present in person or represented by proxy at the meting and entitled to vote thereat shall act as chairman of such meeting and preside thereat. The Secretary of the Corporation, or in his absence, an Assistant Secretary of the Corporation, shall act as Secretary at all meetings of the shareholders. In the absence from any such meeting of the Secretary and all the Assistant Secretaries, the chairman of the meeting may appoint any person to act as Secretary of the meeting.

Section 3.08. Order of Business.

The order of business to be followed at any meeting at which a quorum is present shall be as established by the chairman of the meeting, unless objection thereto shall be made by a shareholder, in which event the order of business shall be established by a majority of the votes of the shareholders present in person or represented by proxy at the meeting and entitled to vote thereat.

Section 3.09. Voting List—Proxies.

(a) At least five days before each meeting of shareholders, the Secretary of the Corporation shall make, or cause to be made, a complete list of the shareholders entitled to vote at the meeting arranged in alphabetical order as to each class of stock with the address of and the number of shares held by each. Such list shall be kept on file at the principal place of business or at the registered office of the Corporation or at the office of its transfer agent or registrar, and shall be subject to inspection, for any proper purpose, at any time during usual business hours, by any shareholder entitled to vote.

(b) Any shareholder may vote either in person or by proxy, provided that a proxy shall not be valid if granted to a person who under the Rail Passenger Service Act of 1970 may not own shares of the class covered by such proxy. A proxy may authorize the casting of votes in any manner authorized by the Articles of Incorporation, as the holder of such proxy may determine in his discretion, or may require that such votes be cast in a particular manner. Every proxy shall be executed in writing by the shareholder or by his duly authorized attorney-in-fact and filed with the Secretary or with the Inspectors of Votes. No proxy shall be valid after eleven months from the date of its execution, unless a longer period is expressly provided therein. Every proxy shall be revocable at the pleasure of the person executing it or his personal representatives or assigns; provided that the parties to a valid pledge or to an executory contract of sale may agree in writing as to which of them shall vote the stock pledged or sold until the contract of pledge or sale is fully executed and the shares transferred on the stock records of the Corporation.

(c) Upon the demand of any shareholder, the vote upon any matter shall be by ballot. On a vote by ballot, each ballot shall be signed by the shareholder voting or by the holder of his proxy, and shall state the class and number of shares voted. At all meetings of the shareholders, all matters properly submitted to the shareholders (except the election of the Directors and matters the manner of deciding which is espe-

cially regulated by law, the Articles of Incorporation or these Bylaws) shall be decided by a majority of the votes of the shareholders of the Corporation present in person or represented by proxy and entitled to vote at such meeting. Shares owned by the Corporation shall not be voted, directly or indirectly, and shall not be counted in determining the existence of a quorum or in determining the total number of outstanding shares for voting purposes.

Section 3.10. Inspectors of Votes.

In advance of any meeting of shareholders the Board of Directors may appoint three Inspectors of Votes to act at such meeting and at any adjournment or adjournments thereof. If such Inspectors are not so appointed, the chairman of any such meeting may, and on the request of any shareholder or his proxy shall, make such appointments. No such Inspector need be a shareholder of the Corporation.

In case any person appointed as such Inspector shall fail or refuse to act, the vacancy may be filled by appointment made by the Board of Directors in advance of the meeting; or if not so filled, such vacancy may, and on request of any shareholder or his proxy shall, be filled at the meeting by the chairman thereof.

The decision, act or certificate of a majority of the Inspectors shall be effective in all respects as the decision, act or certificate of all.

The Inspectors of Votes, or if no Inspectors are appointed, the Secretary of the meeting, shall determine the number of shares outstanding, the voting power of each, the shares represented at the meeting, the existence of a quorum, the authenticity, validity and effect of proxies; receive votes, ballots, assents or consents; hear and determine all challenges and questions in any way arising in connection with the vote; count and tabulate all votes, assents and consents; determine and announce the result of the voting; and do such acts as shall be proper to conduct the election or vote with fairness to all shareholders. On request, the Inspectors, or the Secretary of the meeting, as the case may be, shall make a report in

writing of any challenge, question or matter determined by them and shall make and execute a certificate of any fact found by them. The certificate of the Inspectors, or the Secretary of the meeting, as the case may be, shall be prima facie evidence of the facts stated therein and of the vote as certified.

Section 3.11. Election of Directors.

(a) At any meeting of shareholders for the election of Directors, the presence in person or by proxy of the holders of a majority of the shares of common stock entitled to vote thereat shall be necessary to constitute a quorum for the election of Directors to be elected by the holders of common stock; and the presence in person or by proxy of the holders of a majority of the shares of preferred stock entitled to vote thereat shall be necessary for the election of Directors to be elected by the holders of preferred stock.

(b) If at any meeting of shareholders for the election of Directors there shall not exist the quorum of holders of common stock or preferred stock required for the election of Directors by such class, the meeting may proceed to transact such other business as may be authorized, but with respect to the election of Directors by such class, the meeting shall be adjourned from day to day, or for such longer periods not exceeding fifteen days each, as the holders of a majority of the shares of such class present in person or represented by proxy shall direct, until such quorum of such class shall have been attained and such Directors shall have been elected, provided that, if such quorum shall not have been attained within thirty days from the date of such meeting as originally called, the presence in person or by proxy of the holders of one-third of the outstanding shares of such class entitled to vote thereat shall then be sufficient to constitute a quorum for the sole purpose of election of Directors by such class. The absence of a quorum of the holders of one class shall not affect the election by the holders of the other class of the Directors whom they are entitled to elect.

(c) At any meeting of shareholders at which Directors are to be elected, only persons nominated as candidates shall be eligible for election.

Section 3.12. Appointment of Independent Public Accountants.

Once each year on such day as shall be determined by the Board of Directors, the Board, after receiving a recommendation from the Audit Committee, shall appoint independent public accountants for the purpose of auditing and certifying the annual financial statements of the Corporation for its current fiscal year.

ARTICLE IV

Board of Directors

Section 4.01. General Powers.

The property, affairs and business of the Corporation shall be managed by the Board of Directors.

Section 4.02. Number, Term of Office and Qualifications.

The Board of Directors shall consist of nine persons whose method of appointment or selection and whose term of office shall be as set forth in the Rail Passenger Service Act, as amended, and the Articles of Incorporation. Directors shall be citizens of the United States but need not be shareholders or residents of the District of Columbia.

Section 4.03. Organization of Directors' Meetings.

At all meetings of the Board of Directors the Chairman of the Board, or, in his absence, the Vice Chairman of the Board, or in the absence of the Chairman of the Board and the Vice Chairman of the Board, a chairman chosen by a majority of the Directors present shall act as chairman of such meeting and preside thereat. The Secretary, or in his absence, an Assistant Secretary, shall act as Secretary at all meetings of

the Board. In the absence from any such meeting of the Secretary and all the Assistant Secretaries, the Chairman may appoint any person to act as Secretary of the meeting.

Section 4.04. Resignations.

Any Director of the Corporation may resign at any time by giving written notice of his resignation to the Corporation. Such resignation shall take effect at the time received unless another time is specified therein. The acceptance of such resignation shall not be necessary to make it effective.

Section 4.05. Regular Meetings.

Regular meetings of the Board of Directors shall be held within the District of Columbia or elsewhere at such regular intervals as may be fixed by resolution adopted by a majority of the whole Board and upon such notice, or without notice, as shall be specified in said resolution.

Section 4.06. Special Meetings.

Special meetings of the Board of Directors shall be held whenever called by the Chairman of the Board, the President or any three of the Directors. Notice of each such meeting shall be mailed to each Director at his address appearing on the books of the Corporation or supplied by him to the Corporation for the purpose of notice, at least four days before the day on which the meeting is to be held, or shall be sent to him at such place by telegraph, charges prepaid, or delivered to him personally not later than the second day before the day on which the meeting is to be held. Every such notice shall specify the place, day and hour of the meeting and will specify the business to be transacted or the purpose of the meeting. A waiver of notice of any meeting in writing signed by the Director entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to the giving of such notice. Attendance of a Director at any meeting shall constitute a waiver by him of notice of such meeting except where a Director attends for the express pur-

pose of objecting to the transaction of any business because the meeting was not lawfully called or convened.

Section 4.07. Conference Telephone Meetings.

Notwithstanding the provisions of Section 5 of Appendix A hereto, any or all Directors may participate in a meeting of the Board of Directors or a Committee of the Board by means of conference telephone or by any means of communication by which all persons participating in the meeting are able to hear one another, and such participation shall constitute presence in person at the meeting.

Section 4.08. Quorum, Manner of Acting and Adjournment.

Five members shall constitute a quorum for the purpose of conducting the business of the Board. Except as otherwise specifically provided by statute, the Articles of Incorporation or these Bylaws, the acts of a majority of the Directors present at a meeting at which a quorum exists shall be the acts of the Board of Directors. A majority of the Directors present at any meeting may adjourn the meeting from time to time. Each Director shall be entitled to one vote.

Section 4.09. Filling Vacancies on Board.

Vacancies shall be filed in the same manner as in the case of the original selections.

Section 4.10. Compensation.

Each of the Directors not employed by the Federal Government shall receive compensation at the rate of $300 per diem when engaged in the actual performance of duties. In addition, each Director shall be reimbursed for necessary business travel and subsistence expenses incurred in attending meetings of the Board or of a duly constituted committee of the Board. Each Director shall also be reimbursed for secretarial or professional staff support which is reasonably required, in accordance with policies established by the Board. Directors shall also be entitled to reimbursement for

other expenses incurred in connection with the performance of services as a Director, in accordance with policies established by the Board.

Section 4.11. Outside Interests.

The Board of Directors shall from time to time adopt appropriate rules and regulations providing for the disclosure of any direct or indirect financial or employment interest or relationships of Directors, officers and key employees and members of their immediate families in or with any entities with which the Corporation does or contemplates doing business and governing the conduct of Directors, officers and key employees with respect to contracts and transactions with such entities.

ARTICLE V

Committees

Section 5.01. Executive Committee.

The Board of Directors, by resolution adopted by a majority of the number of Directors stated in the Articles of Incorporation, may designate two or more Directors to constitute an Executive Committee, which Committee shall have and may exercise all of the authority of the Board of Directors in the management of the business and affairs of the Corporation, and may authorize the seal of the Corporation to be affixed to all papers which may require it.

Section 5.02. Committees in General.

The Board of Directors may appoint such other committees as it may deem appropriate to perform such functions as it may designate. Each such committee shall consist of not less than three of the Directors then in office.

Section 5.03. Committee Procedure.

The Board of Directors shall designate one member of each committee to act as its chairman. Each member of any committee shall continue to be a member of that committee only during the pleasure of the Board of Directors. Except as otherwise provided by the Board of Directors, a majority of a committee shall constitute a quorum thereof, and the act of a majority of those present at a meeting at which a quorum is present shall be the act of the committee, provided that any committee may, by unanimous written approval of its members, take action without a meeting of the committee. Meetings of each committee may be called by the chairman of the committee and shall be called by the Secretary of the Corporation at the request of the chairman of the committee or any two members of the committee. Notice of committee meetings shall be mailed to each member at his address appearing on the books of the Corporation or supplied by him to the Corporation for the purpose of notice, at least three days before the day on which the meeting is to be held, or shall be sent to him at such place by telegraph, charges prepaid, or delivered to him personally not later than 24 hours before the time at which the meeting is to be held. Each such notice shall specify the place, day and hour of the meeting but need not specify the business to be transacted or the purpose of the meeting. A waiver of notice of any meeting in writing signed by the member entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to the giving of such notice. Attendance of a member at any meeting shall constitute a waiver by him of notice of such meeting except where a member attends for the express purpose of objecting to the transaction of any business because the meeting was not lawfully called or convened. Whenever a meeting of a committee shall be adjourned, it shall not be necessary to give any notice of the adjourned meeting or of the business to be transacted thereat otherwise than by announcement at the meeting at which such adjournment is taken. Minutes of meetings of committees shall be kept, and all action taken by committees shall be reported to the Board

of Directors at its next meeting. Each committee shall also render such other reports as the Board may request.

ARTICLE VI

Officers

Section 6.01. Officers.

The officers of the Corporation shall be a President and such Executive Vice Presidents and Vice Presidents as may from time to time be elected by the Board of Directors, a Secretary and a Treasurer. The Board of Directors may elect such other officers, including assistant officers, as it may deem necessary, each of whom shall have such authority and perform such duties as the Board of Directors may from time to time determine. The officers of the Board shall be a Chairman and a Vice Chairman.

Section 6.02. Election, Term of Office and Qualifications.

Officers of the Corporation shall be elected by the Board of Directors to serve at the pleasure of the Board. Each officer shall hold his office until his successor shall have been duly elected and qualified in his stead or until he shall resign or shall have been removed in the manner hereinafter provided. No individual other than a citizen of the United States shall be an officer of the Corporation. No officer may have any direct or indirect employment or financial relationship with any railroad (as that term is defined in Section 103 of the Rail Passenger Service Act) during the time of his employment by the Corporation, except that the holding of securities issued by a railroad shall not be deemed to be violative of this prohibition, provided that the officer who holds such securities recuses himself from any decisions which bear directly on such railroad and makes full public disclosure of such holdings. Each officer who holds railroad securities shall, upon notice to the President of the Corporation and other officers, delegate to another officer the responsibility for exercising

powers of his office in connection with any matter bearing directly on railroads whose securities he holds. Any two or more offices may be held by the same person, except that the same person shall not be both President and Secretary.

Section 6.03. Removal.

Any officer elected by the Board of Directors may be removed by the Board of Directors whenever in its judgment the best interest of the Corporation will be served thereby. Any officer of the Corporation may be removed by the President whenever in his judgment the best interests of the Corporation will be served thereby, provided that such removal shall be subject to ratification by the Board of Directors as its next meeting.

Section 6.04. Resignation.

Any officer of the Corporation may resign at any time by giving written notice of his resignation to the Corporation. Such resignation shall take effect at the time specified therein, if any, and if no time is specified therein shall take effect when given. The acceptance of such resignation shall not be necessary to make it effective.

Section 6.05. Vacancies.

Any vacancy in any office because of death, resignation, removal, disqualification or any other cause may be filled by the Board of Directors at any regular or special meeting thereof.

Section 6.06. The Chairman and the Vice Chairman of the Board.

The President of the Corporation shall serve as Chairman of the Board of Directors. The Chairman shall, if present, preside at all meetings of the Board. He shall appoint members to committees of the Board with Board concurrence. He shall advise and consult with the other members of the Board of Directors on matters of policy. In addition, the Chairman shall

carry out all functions required by him by these Bylaws and shall perform such other duties as from time to time may be assigned to him by the Board.

The Board of Directors, by a vote of a majority of all members present, shall elect annually from among its members a Vice Chairman of the Board. The Vice Chairman shall serve in such capacity at the pleasure of the Board, or until his successor has been duly elected and qualified, or until he shall resign or otherwise vacate his office or Board membership. In the absence of the Chairman of the Board, the Vice Chairman shall act in all respects in the stead of the Chairman during such absence. In addition, the Vice Chairman shall carry out all functions required of him by these Bylaws and shall perform such other duties as from time to time may be assigned to him by the Board.

Section 6.07. The President.

The President of the Corporation shall be the Chief Executive Officer of the Corporation. The Chief Executive Officer shall have general supervision of the affairs of the Corporation, subject to the policies and direction of the Board of Directors, and shall supervise and direct all officers and employees of the Corporation, but may delegate in his discretion any of his powers to any officer or such other executives as he may designate.

The President shall perform such other duties as the Board of Directors may from time to time assign to him.

In the order designated by the President, the Executive Vice Presidents and Vice Presidents shall, in the absence of the President, perform his duties as Chief Executive Officer of the Corporation.

Section 6.08. The Executive Vice Presidents and Vice Presidents.

Each Executive Vice President and Vice President shall have such powers and perform such duties as from time to time may be assigned to him by the Board of Directors or the President.

Section 6.09. The Secretary.

The Secretary shall:

(a) see that all notices are duly given in accordance with laws and these Bylaws;

(b) be custodian of the seal of the Corporation and affix such seal to all documents the execution of which, on behalf of the Corporation under its seal, is authorized by the Board of Directors or the Executive Committee, if any, or by any officer or agent of the Corporation to whom power to authorize the affixing of such seal shall have been delegated;

(c) keep, or cause to be kept, in books provided for the purpose, minutes of the meetings of the shareholders, of the Board of Directors, and each committee of the Board;

(d) keep or cause to be kept registers or other appropriate records of the shareholders of all classes of stock;

(e) see that the books, reports, statements, certificates, voting lists and all other documents and records required by law are properly kept and filed;

(f) sign such instruments as require the signature of the Secretary; and,

(g) in general, perform all the duties incident to the Office of Secretary and such other duties as from time to time may be assigned to him by the Board of Directors.

Section 6.10. The Treasurer.

The Treasurer shall be responsible for all receipts and disbursements of the Corporation and the custodianship of the Corporation's funds. He shall have full authority, directly or by his delegation to selected officers or other employees, to receive and give receipts for all monies due and payable to the Corporation from any source whatever, and to endorse checks, drafts, and warrants in its name and on its behalf. He shall be responsible for depositing the funds of the Corporation in its name in such depositories as may be designated by him, shall sign or delegate the signing of all checks, notes and drafts and shall be charged with the general establishment of the Corporation's policies and procedures relating to short-term financing, cash management, credits and collections and insurance.

The Treasurer shall perform such other duties as from time to time may be assigned to him by the Board of Directors.

The Treasurer shall give a bond for the faithful discharge of his duties in such sum and with such sureties as the Board of Directors shall determine.

Section 6.11. The Controller.

The Controller shall be the Chief Accounting Officer of the Corporation and shall arrange for the keeping of adequate records of all assets, liabilities and transactions of the Corporation.

Section 6.12. Compensation.

The compensation of the officers shall be fixed from time to time by the Board of Directors. Except with the prior approval of the Board of Directors, no officer of the Corporation shall receive any salary from any source other than the Corporation during his period of employment by the Corporation.

ARTICLE VII

Shares and Their Transfer

Section 7.01. Certificates for Shares.

Shares of stock of the Corporation shall be represented by certificates for shares in such form as the Board of Directors may from time to time prescribe. No certificate representing any share shall be issued until such share is fully paid. No certificate for shares of stock of the Corporation shall be valid unless it shall have been signed by the President or a Vice President and by the Secretary or an Assistant Secretary and

shall have been impressed with the corporate seal; provided, however, that to the extent permitted by law, the signatures of such officers or any of them and such corporate seal may be a facsimile.

Section 7.02. Transfer of Stock.

Except as otherwise provided by law, transfer of shares of stock of the Corporation shall be made on the books of the Corporation only by the holder hereof, or by his attorney thereunto authorized by a duly executed power of attorney, and on surrender of the certificate or certificates for such shares properly endorsed and the payment of all taxes on the transfer thereof. The Corporation shall have the right to treat the person whose name is registered upon its books as the holder of any shares of its stock as the absolute owner of such shares, and, except as otherwise provided in these Bylaws, such person shall have the exclusive right to vote and to receive dividends thereon.

Section 7.03. Substituted Certificates.

Any person claiming a certificate for shares alleged to have been lost, stolen or destroyed shall make an affidavit or affirmation of that fact, shall give the Corporation and its registrar or registrars and its transfer agent or agents a bond of indemnity satisfactory to the Board of Directors or to the Executive Committee or to the President or a Vice President and the Secretary or the Treasurer, and, if required by the Board of Directors or the Executive Committee or such officers, shall advertise the same in such manner as may be required, whereupon a new certificate may be executed and delivered of the same tenor and for the same number of shares as the one alleged to have been lost, stolen or destroyed.

Section 7.04. Regulations.

The Board of Directors may make such rules and regulations as it may deem expedient concerning the issue, transfer and registration of certificates for shares of stock of the Corporation. It may appoint one or more transfer agents and

one or more registrars and may require all certificates of stock to bear the signature of either a transfer agent or a registrar or both.

Section 7.05. Closing Transfer Books—Fixing Record Date, Etc.

Insofar as permitted by law, the Board of Directors shall have power to close the stock transfer books of the Corporation for a period not exceeding fifty days preceding the date of any meeting of the shareholders, or the date fixed for the payment of any dividend or distribution, or the date for the allotment of rights, or the date when any change or conversion or exchange of shares will be made or go into effect. If the stock transfer books are so closed for the purpose of determining shareholders entitled to notice of or vote at a meeting of shareholders, such books shall be closed for at least ten days immediately preceding the date of such meeting. If the stock transfer books are so closed for any purpose, written or printed notice of the closing shall be mailed at least ten days before the closing to each shareholder of record of the Corporation at his address appearing on the records of the Corporation, or supplied by him to the Corporation for the purpose of notice. While the stock transfer books of the Corporation are closed, no transfer of shares shall be made thereon. In lieu of closing the stock transfer books as aforesaid, the Board of Directors may, in its discretion, fix a time, not more than fifty days prior to the date of any meeting of shareholders or the date fixed for the payment of any dividend or distribution, or the date for the allotment of rights, or the date when any change or conversion or exchange of shares will be made or go into effect, and, in the case of a meeting of shareholders, not less than ten days before the date of the meeting, as a record date for the determination of shareholders entitled to notice of, or to vote at any such meeting, or entitled to receive payment of any such dividend or distribution, or to receive any such allotment of rights, or to exercise the rights in respect of any such change, conversion or exchange of shares. If a record date shall be fixed as afore-

said, such persons as shall be shareholders of record on the date so fixed, and only such persons, shall be entitled to notice of, or to vote at, such meeting, or to receive payment of such dividend, or to receive such allotment of rights, or to exercise such rights, as the case may be, notwithstanding any transfer of any shares on the books of the Corporation after any record date so fixed as aforesaid. If the stock transfer books of the Corporation shall not be closed as herein provided and if a record date for the determination of shareholders entitled to receive notice of, or to vote at, any shareholders' meeting shall be fixed as herein provided, the date on which notice of the meeting is given shall be in accordance with Section 3.05 of these Bylaws and shall be the record date for such determination.

ARTICLE VIII

Seal

Section 8.01. Seal.

The Corporation shall have a corporate seal, which shall be in the form of a circle and shall bear the full name of the Corporation and the words and figures "Corporate Seal—District of Columbia—1971" or words and figures of similar import.

ARTICLE IX

Indemnification and Insurance

Section 9.01. Indemnification.

(a) The Corporation shall indemnify any person who was or is a party or is threatened with being made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, including all appeals (other than an action, suit or proceeding by or in the right of the Corporation), by reason of the fact

that he is or was an incorporator, director, officer, or employee of the Corporation, or is or was serving at the request of the Corporation as a director, officer or employee of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, decrees, fines, penalties and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the Corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not of itself create a presumption that the person did not act in good faith or in a manner which he reasonably believed to be in or not opposed to the best interests of the Corporation or, with respect to any criminal action, suit or proceeding, that he had reasonable cause to believe that his conduct was unlawful.

(b) The Corporation shall indemnify any person who was or is a party or is threatened with being made a party to any threatened, pending or completed action, suit or proceeding, including all appeals, by or in the right of the Corporation to procure a judgment in its favor by reason of the fact that he is or was an incorporator, director, officer or employee of the Corporation, or is or was serving at the request of the Corporation as a director, officer or employee of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action, suit or proceeding. The Corporation shall also indemnify any such person against amounts paid in settlement of such action, suit or proceeding up to the amount that would reasonably have been expended in his defense (determined in the manner provided for in Subsection (d)) if such action, suit or proceeding had been prosecuted to a conclusion. However, indemnification under this Subsection shall

be made only if the person to be indemnified acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the Corporation and no such indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been finally adjudged to be liable for negligence or misconduct in the performance of his duty to the Corporation unless, and only to the extent that, the court or body in or before which such action, suit or proceeding was finally determined, or any court of competent jurisdiction, shall determine upon application that, despite the adjudication of liability, but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses or other amounts paid as such court shall deem proper.

(c) Without limiting the right of any incorporator, director, officer or employee of the Corporation to indemnification under any such Subsection hereof, if such person has been substantially and finally successful on the merits or otherwise in defense of any action, suit or proceeding referred to in Subsections (a) and (b), he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith.

(d) Except in a situation governed by Subsection (c), any indemnification under Subsections (a) and (b) (unless approved by a court) shall be made by the Corporation only as authorized in the specific case upon a determination that indemnification of the incorporator, director, officer or employee is proper in the circumstances because he has met the applicable standard of conduct set forth in Subsections (a) and (b). Such determination shall be made (1) by the Board of Directors by a majority vote of a quorum consisting of Directors who are not or were not parties to or threatened with such action, suit or proceeding, or any other action, suit or proceeding arising from the same or similar operative facts, or (2) if such a quorum is not obtainable, or even if obtainable, if a majority of such quorum of disinterested Directors so directs, by independent legal counsel (compensated by the Corporation) in a written opinion.

(e) Expenses of each person indemnified hereunder incurred in defending a civil, criminal, administrative or investigative action, suit or proceeding (including all appeals) or threat thereof, may be paid by the Corporation in advance of the final disposition of such action, suit or proceeding as authorized by the Board of Directors, whether a disinterested quorum exists or not, upon receipt of an undertaking by or on behalf of the incorporator, director, officer or employee to repay such expenses unless it shall ultimately be determined that he is entitled to be indemnified by the Corporation.

(f) The indemnification provided by this Article shall not be deemed exclusive of or in any way to limit any other rights to which any person indemnified may be or may become entitled as a matter of law, by the Articles, agreements, insurance, vote of shareholders or otherwise, with respect to actions in his official capacity and with respect to action in another capacity while holding such office and shall continue as to a person who has ceased to be an incorporator, director, officer or employee and shall inure to the benefit of the heirs, executors and administrators of such a person.

(g) Subsections (a) through (f) of this Article shall apply to such agents of the Corporation as are designated at any time by the Board of Directors.

(h) If any part of this Article shall be found, in any action, suit or proceeding, to be invalid or ineffective, the validity and the effect of the remaining parts shall not be affected.

Section 9.02. Liability Insurance.

The Corporation may purchase and maintain insurance on behalf of any person who is or was an incorporator, director, officer, employee or designated agent of the Corporation or is or was serving at the request of the Corporation as a director, officer, employee or designated agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the Corporation would have the power to indemnify him

against such liability under the provisions of this Article or of the District of Columbia Business Corporation Act.

ARTICLE X

Amendment of Bylaws

Section 10.01. Amendment of Bylaws.

These Bylaws may be amended by the vote of a majority of the Directors then in office at a meeting at which a quorum is present or by unanimous consent in writing of all the Directors in office.

APPENDIX A (to the Corporation's Bylaws)

Open Meetings of the Board of Directors of the Corporation

Page

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Section 1 - The Purpose and Scope of this Appendix.

The Corporation fully endorses the principle of making available to the public information regarding the decision-making processes of the Board of Directors. It is the purpose of this Appendix to open the meetings of the Board of Directors to the public except where such meetings may be closed under this Appendix.

Meetings should be opened to afford the public a full opportunity to be aware of the conduct of the Corporation's business; at the same time, the provisions of this Appendix should not interfere with the rights of individuals or with the ability of the members of the Board of Directors to carry out their corporate and statutory responsibilities. This Appendix implements the spirit and intent of the Government in the Sunshine Act (5 U.S.C. §§ 552b). Public access to documents being considered at meetings of the Corporation's Board of Directors shall be obtained in the manner and to the extent as set forth in the Freedom of Information Act (5 U.S.C. §§ 552).

Section 2 - Definitions.

a. "Act" means the Rail Passenger Service Act (45 U.S.C. § 501 *et seq.*);

b. "Chairman" and "Vice Chairman" means the Chairman and Vice Chairman of the Board of Directors, or in their absence a chairman chosen by a majority of the members of the Board of Directors present to act as chairman of a meeting and to preside thereat;

c. "Corporation" means the National Railroad Passenger Corporation;

d. "Meeting" means the deliberations of at least a quorum of the Board of Directors where such deliberations determine or result in the disposition of corporate business. The term includes both regular and special meetings of the Board of Directors.

The term "meeting" as used herein shall exclude: (1) deliberations of a majority of the members of the Board of Directors for the purpose of (A) calling a meeting at a date earlier than the requisite public notice period, (B) determining whether to close a meeting or series of meetings, or any portion thereof, to the public, or (C) changing the subject matter of a meeting which has already been publicly announced; and (2) presentations by management or other parties of information, data, and other materials relating to proposed actions on behalf of the Corporation.

e. "Member of the Board of Directors" means an individual who has been selected as a member of the Corporation's Board of Directors pursuant to Section 303 of the Act (45 U.S.C. § 543).

f. "Vote" means a poll of the members of the Board of Directors taken at a meeting or by telephone or by other means of communication.

g. "Secretary" means the Secretary of the Corporation and, in the absence or disability of the Secretary, those duly authorized to act in such capacity.

Section 3 - Preparation of Agenda in Advance of the Meeting.

a. In order to assure that the public will receive proper advance notice of meetings and in order to facilitate the issuance by the Corporation of the public announcement of meetings, the Secretary shall, to the extent feasible, undertake to prepare the agenda for a meeting twelve days in advance of the scheduled meeting date.

b. The agenda for a future scheduled meeting shall be, to the extent feasible, approved by the Chairman or Vice Chairman of the Board of Directors at least nine days prior to the future scheduled meeting date.

c. The Secretary shall respond to all inquiries concerning meeting agendas.

Section 4 - Public Announcements of Meetings; Subsequent Changes.

a. In the case of each meeting, the Corporation shall make an announcement to the public, at least one week before the meeting, which (A) states the time, place and date of the meeting, (B) sets forth the subject matter or agenda items to be discussed at the meeting, (C) states whether the meeting, or any portion thereof, is to be open or closed to the public, (D) gives the name and business telephone number of the Secretary.

b. The requirement to announce a meeting one week in advance shall not apply to the extent the Chairman of the Board determines that the business of the Corporation so requires in which case the Corporation shall at the earliest practical time make an announcement to the public containing the information required by paragraph a. of this section.

c. The time or place of a meeting, the subject matter of a meeting, or the determination to open or close a meeting, or any portion thereof, may be changed following the announcement to the public required by this Section if a majority of the

members of the Board determines that the business of the Corporation so requires.

d. The Board of Directors expressly reserves the right during the course of a meeting to discuss and to vote on a matter not previously announced as an agenda item if circumstances so require.

e. The Secretary shall issue each announcement to the public required by this Appendix by immediately (A) releasing each announcement to the press, (B) posting each such announcement on a bulletin board located at the Corporation's principal office in Washington, D.C., (C) making and maintaining copies thereof for interested members of the public and the staff. Upon the written request of any member of the public for notices of meetings of the Board of Directors, the Secretary will include the name and mailing address of any such member of the public on the mailing list maintained by the Corporation.

Section 5 - Open Meetings.

a. All meetings shall be conducted in accordance with the provisions of this Appendix. Except as provided in Section 6, every portion of every meeting shall be open to attendance by the public. Such attendance does not include participation, orally or otherwise, in discussions or any conduct or activity other than the opportunity to be present and persons who fail to honor this privilege as set forth will be removed from the meeting. No signs, placards, distribution of leaflets or similar conduct, or the use of cameras by the public will be permitted. The use of cameras by members of the press and the crews of television stations is permitted at the discretion of the Chairman. The use of electronic or other recording devices is permitted where it does not interfere with or disrupt the orderly conduct of the meeting.

b. Members of the Board of Directors shall not jointly conduct or dispose of the business of the Corporation other than in accordance with the provisions of this Appendix. This prohibition shall not apply to briefings for the Board held by

management when no final disposition of corporate business occurs.

c. The Secretary shall be responsible for seeing that adequate space, sufficient seating and adequate acoustics are provided for public attendance of meetings. If the space available for the public proves insufficient to accommodate all persons wishing to attend, the Board of Directors shall limit admission to representatives of those persons seeking admission to the meeting.

Section 6 - Closed Meetings.

a. The provisions of this Appendix shall not apply to any portion of a meeting in which the deliberations are likely to:

(1) disclose matters that are (A) specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy and (B) in fact property classified pursuant to such Executive Order;

(2) relate solely to the internal personnel rules and practices of the Corporation;

(3) disclose matters specifically exempted from disclosure by statute (other than 5 U.S.C. § 552): provided, that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) disclose trade secrets and commercial or financial information;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would

be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed action by the Corporation, except in any instance where the Corporation has already disclosed to the public the content or nature of its proposed action, or where the Corporation is required by law to make such disclosure on its own initiative prior to taking final corporate action on such proposal; or

(10) specifically concern the Corporation's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration.

b. Whenever any person whose interest may be directly affected by a portion of a meeting requests that the Board of Directors close such portion to the public for any of the reasons referred to in subparagraphs (5), (6), or (7) of paragraph a. of this Section, the Board of Directors, upon the request of one of its members, shall vote whether to close such meeting.

c. Subject to the requirements of this Section, any meeting in progress may be closed forthwith and members of the public in attendance required to leave if the discussion begins to involve a matter exempted under subparagraphs (1) through (10) of paragraph a. of this Section.

PLAINTIFF'S EXHIBIT 122

[LETTERHEAD OF METROPOLITAN TRANSPORTATION AUTHORITY]

August 25, 1988

National Railroad Passenger Corporation
400 North Capitol Street, N.W.
Washington, D.C. 20001

Re: Letter Agreement—
Ventilation Enclosure Modification

Dear Sir/Madam:

The undersigned, a New York public benefit corporation (the "MTA"), may construct and operate a development (the "Development") in the air-rights over the John D. Caemmerer West Side Yard (the "Yard"), which is located between 10th and 12th Avenues and West 30th and 33rd Streets in the Borough of New York, State of New York, and is used by the Long Island Rail Road Company, a subsidiary of the MTA (the "LIRR"). The Development may also include the property located between 11th and 12th Avenues and West 33rd and 34th Streets (the "Swing Block"), which property is currently owned by the New York Convention Center Development Corporation (the "Convention Center").

Pursuant to an Easement Agreement (the "Easement Agreement") to be entered into between the Convention Center and you ("Amtrak"), the Convention Center will grant to Amtrak certain rights to occupy the Convention Center property described therein for purposes of, among other things, construction of a railroad tunnel (the "Tunnel"). In connection with the construction of the Tunnel, Amtrak intends to construct a ventilation enclosure (the "Ventilation Enclosure") and fire escapes under a portion of West 33rd Street and, if necessary, a portion of the Westerly Easement granted under the Easement Agreement. The Ventilation

Enclosure, as currently planned by Amtrak, will vent the tunnel exhaust in a southward direction above the Yard. Until such time as an Implementation Notice (as hereinafter defined) is delivered to Amtrak, the location and direction of venting of the Ventilation Enclosure is consented to by MTA.

The proposed plan for the Development calls for the construction of a platform (the "Platform") over the Yard at approximately the level of the current West 33rd Street viaduct. As a result, the Yard will be enclosed and, without modification, the Ventilation Enclosure would vent the tunnel exhaust into the enclosed Yard. The MTA and Amtrak desire to enter into an agreement whereby the Ventilation Enclosure would be modified to provide for venting the exhaust through a chimney duct or other appropriate structure.

For good and valuable consideration, receipt of which is hereby acknowledged, Amtrak agrees with MTA as follows:

1. If the MTA, in its sole but reasonable discretion, determines that in connection with the construction of the Development, the Ventilation Enclosure, including the equipment which is part thereof, must be modified, added to, or retrofitted (such modification, addition and retrofit are hereinafter collectively referred to as the "Modification") so as to vent the exhaust therefrom to a point above the Platform or in such other manner as may be required hereunder, it shall notify (the "Implementation Notice") Amtrak of such determination no later than six (6) months prior to the date on which Amtrak shall be required to commence the construction of the Modification pursuant to Section 6 below.

2. Upon receipt of the Implementation Notice, Amtrak shall consult with the MTA, or its designee, to determine the design of the Modification, which design shall be subject to the following terms and conditions:

(a) Amtrak shall have the right to attach any chimney duct portion of the Modification to, and to support it from, the Platform or other structural components of the Development;

(b) the MTA, at no cost to Amtrak, shall provide to Amtrak an easement or other right to occupy sufficient space in and through that portion of the Yard, the Platform and the space above and below the Platform which, in MTA's sole but reasonable discretion and in the context of the design of the Development, the design of the Modification, and the requirements of the LIRR referred to in Section 2(d) below, provides a reasonably direct route for the chimney duct or related structure;

(c) MTA acknowledges (i) that it has received a letter dated August 17, 1988 from Parsons Brinckerhoff Quade & Douglas (the "Parsons Letter"), a copy of which is attached as Exhibit 1 hereto, and (ii) that, in the context of the plans for the Development as they exist on the date of this letter agreement but without any acknowledgement with respect to any changes to the plans for the Development in the future, the plans shown as Option A and Option B in Exhibit B to the Parsons Letter would provide a reasonably direct route for the chimney duct or related structure for purposes of Section 2(b) hereof;

(d) the design, in the opinion of the Chief Engineer of the LIRR, shall not be determined to be unsafe to LIRR's operations in the Yard or to the Development and/or its structural components;

(e) the design shall not, in the reasonable opinion of MTA, reduce or have an adverse affect on the utility, value or architectural integrity of the Development to any greater degree than the designs for the Modification set forth in the Parsons Letter reduce or have an adverse affect on the utility, value or architectural integrity of the Development as planned on the date of this letter agreement; and

(f) the design shall meet all applicable regulations and requirements of governmental agencies and authorities having jurisdiction in connection therewith (assuming, for such purposes, that, unless the MTA or its affiliates

have actually obtained exemption from or affirmatively overridden such regulations and requirements, neither the MTA nor any of its affiliates are exempt from, or have the power to override, such regulations and requirements), including, without limitation, building, fire, noise or related codes and regulations as applied at the time of construction of the Modification and in the context of the constructed and proposed elements of the Development.

3. (a) If, at the time a design for the Modification must be approved under Section 2 hereof, such design (i) conforms in all material respects to Option A or Option B in Exhibit B to the Parsons Letter, (ii) meets reasonably prudent design standards, and (iii) complies with the terms and conditions of Section 2 above, such design is acceptable to MTA.

(b) Notwithstanding any provision of this letter agreement to the contrary, if a design for the Modification which meets the terms and conditions of Section 2 hereof is impossible from an engineering perspective, Amtrak, at its own cost and expense and regardless of amount, shall take all actions that are necessary to otherwise vent the Tunnel in such a manner that it will not impair the Development in any material respect, including, without limitation, the right of MTA to construct or cause to be constructed residential or hotel units in the vicinity of the Ventilation Enclosure or any relocated or reconfigured ventilation facility.

(c) Notwithstanding any provision of this letter agreement to the contrary, in no event shall Amtrak be required to expend funds to cause the Modification to meet noise code regulations more stringent than the most stringent of those applicable to (i) hotel units, (ii) residential units or (iii) any other use which is required to be sited in the vicinity of the Ventilation Enclosure by the City of New York as a condition to or in connection with rezoning of the site of, or approval of a building or special permit for, the Development.

4. No later than three (3) months following receipt of the Implementation Notice, Amtrak shall deliver to the MTA, or its designee, five (5) sets of preliminary detail drawings, outline specifications and, to the extent available, schedules (collectively the "Preliminary Design Documents") for the construction of the Modification. The MTA, or its designee, shall approve or disapprove with specific comments noted on the Preliminary Design Documents within thirty (30) calendar days of receipt. If the Preliminary Design Documents are disapproved, Amtrak shall submit to the MTA, or its designee, five (5) sets of revisions to the Preliminary Design Documents ("Progress Design Documents") no later than thirty (30) calendar days following its receipt of the disapproved Preliminary Design Documents. The MTA, or its designee, and Amtrak shall agree on an acceptable design not later than thirty (30) calendar days following receipt of the Progress Design Documents by the MTA, or its designee. Amtrak shall submit five (5) sets of final working drawings and specifications and schedules to the MTA Developer not later than thirty (30) calendar days following agreement on the final design. The review and approval of the design of the Modification shall be subject to the terms and conditions set forth in Section 2 above and the design shall be approved if it satisfies those terms and conditions and meets reasonably prudent design standards.

5. As soon as practicable after the Implementation Notice is received, the MTA, or its designee, and Amtrak shall agree on terms relating to (a) conditions for commencement of construction of the Modification, (b) access rights, (c) insurance and indemnification requirements, (d) scheduling, (e) the liquidated damages amount and terms referred to in Section 6(b) hereof, and (f) related matters, all of which shall be customary and reasonable.

6. Amtrak shall cause the construction of the Modification (a) to commence as soon as practicable following agreement on the final design and (b) to be expeditiously pursued to

completion. During such construction, the MTA shall, upon the request of Amtrak received no later than four (4) weeks prior to the initial outage date, cause the LIRR to take Track No. 30 at the Yard out of service for one consecutive period not to exceed four (4) weeks in duration. As part of the agreement on terms contemplated by Section 5 hereof, Amtrak shall agree to cause its contractor for the Modification to agree to a liquidated damages provision in favor of the LIRR and in an amount which LIRR determines to be reasonable in the event that Track No. 30 is required to be out of service for a period in excess of four (4) weeks. Amtrak, at its own cost and expense, shall, upon completion of construction of the Modification, restore all LIRR property to the condition such property was in immediately prior to commencement of construction of the Modification. Amtrak shall reimburse the LIRR for all reasonable LIRR costs for railroad protective services, field engineer and transportation supervision and design document review in connection with construction of the Modification.

7. Amtrak shall pay the entire cost and expense of the design, construction and maintenance of, and materials for, the Modification, provided, however, that Amtrak shall not be responsible for and shall have no obligation with respect to any costs and expenses relating to (a) the Platform or other structural components of the Development or any temporary supporting structure that may be required if the Platform in the vicinity of the Ventilation Enclosure has not been completed at the time of construction of the Modification, (b) the easement or other rights referred to in subsections 2(a) and (b) hereof, or (c) the removal from service of Track No. 30 at the Yard referred to in Section 6 hereof, except that the obligation referred to in the last sentence of Section 6 shall not be affected by the terms of this Section 7. Provided that (i) an alternative to all or a portion of MTA's design for the Development has been presented to MTA in writing by Amtrak, (ii) such alternative is satisfactory in all respects to MTA, including, without limitation, that such alternative is no

more expensive and, in the reasonable opinion of MTA, does not reduce or adversely affect the utility, value or architectural integrity of the Development, and (iii) such alternative otherwise conforms to all requirements imposed by the City of New York, including, without limitation, the terms, conditions and requirements of any zoning and/or building or special permit relating to the Development, MTA agrees that in designing and constructing the Development it shall take no action which would increase Amtrak's costs for the design, construction and/or maintenance of the Modification.

8. Amtrak and MTA agree to cooperate with each other and to cause their respective agents and contractors to cooperate with reasonable requests of representatives of the other party to the fullest extent practicable (including, without limitation, requests for design and construction drawings with respect to those portions of the Development affecting the Ventilation Enclosure and the Modification), so that the design and construction of the Modification may be completed in an orderly, timely and efficient manner.

9. If Amtrak shall fail to perform its obligations under this letter agreement, MTA shall have the right to perform on behalf of Amtrak, including the right, to the extent necessary, to enter and modify the Ventilation Enclosure; provided, however, that in exercising such right, MTA shall perform in a manner which minimizes any adverse effect on rail operations in the Tunnel. If MTA exercises such right, Amtrak shall reimburse MTA for all of MTA's costs and expenses in connection with the performance of Amtrak's obligations hereunder including, without limitation, any costs and expenses relating to performance intended to minimize any adverse effect on rail operations in the Tunnel.

10. Any dispute, claim, or controversy ("Dispute") between the parties hereto relating to the interpretation, application, or implementation of this letter agreement shall be submitted to binding arbitration in the following manner:

(a) Prior to initiating arbitration, the party wishing to initiate arbitration (the "Initiating Party") shall have one of its senior officers discuss the Dispute with one of the senior officers of the other party in an effort to resolve the Dispute;

(b) If the Dispute is not resolved pursuant to paragraph 10(a) above, the Initiating Party shall notify the other party in writing of its desire to submit the Dispute to arbitration. Such notice shall contain a statement of the issues to be arbitrated and shall designate an individual to serve as its party-appointed arbitrator on behalf of the Initiating Party.

(c) Within fifteen (15) calendar days after receipt of such notice, the other party shall respond in writing by designating an individual to serve as its party-appointed arbitrator. If such designation does not occur within fifteen (15) calendar days, the Initiating Party may request that the American Arbitration Association appoint the second party-appointed arbitrator subject to the limitations on acceptable candidates set forth in paragraph 10(d) below.

(d) Within fifteen (15) calendar days of the designation of the second party-appointed arbitrator, the two party-appointed arbitrators shall appoint a third arbitrator who shall serve as chairman of the arbitration panel. If the two party-appointed arbitrators fail to appoint a third arbitrator within the time provided herein, then either party, on behalf of both and after notice to the other, may request such appointment by the American Arbitration Association in accordance with its then prevailing rules for commercial arbitration. The American Arbitration Association shall appoint, from among those candidates on its National Panel who are attorneys, a third arbitrator who shall have no prior relationship to commuter, intercity passenger, or freight railroads or to either Amtrak, MTA, LIRR, the Convention

Center or any parties involved in the Development, provided, however, that any of the criteria stated in the first part of this sentence may be waived as to any arbitration proceeding hereunder if both parties agree.

(e) The arbitrators shall promptly hear and decide the Dispute submitted to them, in accordance with the rules for commercial arbitration of the American Arbitration Association, as such rules may be modified or supplemented by decision of the arbitrators. The arbitrators shall determine the situs of the arbitration and shall give to both parties reasonable notice of the time and place for filing written submissions and for hearings, if any.

(f) The arbitrators, or a majority of them, shall promptly render their decision and award in writing to the parties, and their decision shall include an explanation of their resolution of all substantial issues before them.

(g) Any arbitration decision rendered hereunder shall be final and binding upon the parties; provided, however, that judicial review may be sought in a court of competent jurisdiction to determine (i) whether the award was procured by corruption, fraud, or undue means; (ii) whether there was evident partiality in the third arbitrator or corruption in any of the arbitrators; (iii) whether the arbitrators were guilty of any other misbehavior by which the rights of either party have been prejudiced; or (iv) whether the arbitrators exceeded their powers, or so imperfectly executed them that a final and definitive award upon the Dispute was not made. Judgment upon any arbitration award may be entered in any court having jurisdiction over the parties. The parties hereto agree that, in the event a judicial proceeding is instituted to review any arbitration award, interest on such award, as provided by paragraph 10(h) below shall, unless the award is not confirmed, continue to accrue during the pendency of such judicial proceeding until such time as

a final decision is rendered and any payment required by the award has been made.

(h) Any decision of the arbitrators, or of any court of competent jurisdiction which reviews such arbitrators' decision requiring one party to pay money to the other shall be accompanied by an award of interest, computed at the lesser of the applicable usury rate, if any, or the prime rate for preferred commercial borrowers at Chase Manhattan Bank, N.A. prevailing as of the date of the award. In the case of an award pertaining to a payment obligation of one of the parties hereto, interest shall accrue from the date the obligation to pay the money first arose. In the case of an award pertaining to any other obligation as to which damages are awarded, interest shall accrue from the date such party breached the obligation, all as determined by the arbitrators.

(i) Each party shall bear its own cost of arbitration, and the party against whom an award is made shall in addition bear the cost of the third arbitrator unless the award is vacated, in which event the unsuccessful party shall bear such costs.

(j) Each party shall make every reasonable effort to obtain the prompt resolution of Disputes which are submitted to arbitration pursuant to this Agreement. The parties specifically agree that neither party shall delay the arbitration process significantly by insisting on the application of extensive procedural steps or other actions which cannot clearly be expected to improve the ability of the arbitrators to render a reasonable and fair decision.

* * *

Please indicate your agreement to the above terms and conditions by executing and returning the enclosed counterparts of this letter agreement.

METROPOLITAN TRANSPORTATION AUTHORITY

By: /s/ [ILLEGIBLE]
Title: Executive Director

AGREED AND ACCEPTED:
NATIONAL RAILROAD PASSENGER CORPORATION

By: /s/ [ILLEGIBLE]
Title: Executive Vice President & Chief Operating Officer
Date: August 26, 1988

CONTRACT FOR: RAIL ADVERTISING (CAR CARDS, POSTERS, TIMETABLES, DIORAMAS, EXHIBITS, ETC.)

[X] NEW [ ] RENEWAL

FROM
Michael A Lebron
36 Cooper Square
Suite 7?
New York, NY 10003
(212) 477-0748

CONTRACT NO.

DATE July 31, 1992

BRAND NAME/PRODUCT(s)

SALESPERSON: NAME Bill Schwartz

NUMBER #318

TO
[LOGO OF TDI TRANSPORTATION DISPLAYS INCORPORTATED]

SHIPPING ADDRESS
TDI
49-29 Maspeth Avenue
Maspeth, NY 11388

SHIPPING QUANTITY

STATE AND MARKET	SIZE SHOWING	NO. OF DISPLAYS	TYPE OF DISPLAY	SIZE (HEIGHT & WIDTH)	STARTING DATE	NO. OF MONTHS	COST PER MONTH
Penn Station Spectacular		1	Spectacular	10'3"x 102'10"	1/1/93	2	$18,500 gross maintenance - $2,200. net

SCHEDULE

YEAR

DATES ORDERED	JAN.	FEB.	MAR.	APR.	MAY	JUNE	JULY	AUG.	SEPT.	OCT.	NOV.	DEC.
1993	x	x										

SPECIAL INSTRUCTIONS

THIS IS YOUR AUTHORITY TO DISPLAY AND MAINTAIN THE SHOWING SPECIFIED ABOVE IN ACCORDANCE WITH THE CONDITIONS ON THE REVERSE SIDE OF THIS CONTRACT.

ACCEPTED AND AGREED TO BY—TRANSPORTATION DISPLAYS INCORPORATED ADVERTISER/AGENT

BY /s/ [ILLEGIBLE] **DATE** 11/30/92
CONTRACT FOR RAIL ADVERTISING

X /s/ [ILLEGIBLE]
PLEASE PRINT x MICHAEL A. LEBRON
Name—Title

DEFENDANTS' EXHIBIT H

TERMS AND CONDITIONS

I. TERMS OF PAYMENT

a. Bills will be rendered monthly in advance dating from commencement date of contract and Advertiser agrees to make payment not in advance upon receipt of bills. Default shall be deemed to occur whenever any monthly bills shall be unpaid for Thirty (30) days.

b. TDI reserves the rights, at any time upon default by advertiser in the payment of bills at its sole option either (1) to consider that the entire total balance of payments to be made under this contract shall be accelerated and become immediately due and payable; or (2) to cancel this contract and to require immediate payment of the balance due, including the addition of the applicable short term rate. Advertiser agreed to pay forthwith the amount determined to be due TDI in accordance with either of the above options and to reimburse TDI for any expense that it may incur in the collection of said amount, provided the amount so reimbursed shall not exceed 20% of the unpaid balance of the contract.

c. Payments are subject to late payment charge of one and one-half percent (1.5%) per month (18% per annum), or such lesser amount as permitted by law. Such charge will be added to billed amounts that are 30 days late. This shall also apply to balances under I-b. above.

II. RATES

a. Annual rates are applicable only to contracts for display periods of twelve consecutive months. Additional percentages are charged for shorter terms that may be specified in this contract, or in any renewal or curtailment thereof.

b. All rates and adjustments are computed on the basis of thirty days to the month.

c. Unless otherwise specified on the face hereof, all rates are for use of space only, and do not include cost of designing, producing or delivering display material.

d. Unless otherwise specified on the face hereof, service charges will be made for all changes in display material after initial placement of showing required under this contract except that advertiser agrees to assume all expense in connection with initial installation as well as subsequent changes of display material required under all contracts for exhibits and TDI Islands.

e. Unless otherwise specified on the face hereof, rate indicated in this contract is not subject to advertising agency commission.

III. ADVERTISING MATERIAL

a. All advertising copy is subject to approval of TDI and the Transportation Facility concerned as to character, text, illustration, design and operation.

b. Advertiser will be responsible for preparation and delivery of display material to designated TDI service points without expense to TDI at least the required minimum time before date of commencement of contract or desired date of change. If Advertiser's material is not received by the required date, TDI is hereby authorized at its sole option to leave vacant or to use substitute copy in spaces allocated to Advertiser under this contract and advertiser agrees that he will pay for such use of the spaces.

c. TDI is hereby authorized to remove and to leave vacant or to use substitute copy for any display material which may be defaced, damaged or otherwise become deteriorated and for which Advertiser has failed to provide replacements, without liability or expense to TDI. It is hereby agreed that non-use of space arising from Advertiser's failure to provide such replacement will not relieve Advertiser from obligation to pay for such space.

d. Advertiser agrees to prepare and deliver required art work and copy or plates for TDI publication to TDI's New York office at least the required minimum number of days prior to date of intended publication. If copy is not so received, TDI is hereby authorized to repeat advertiser's previous advertisements or to publish the Advertiser's name, business and address in the space covered by this contract, and advertiser agrees to pay for such use of space.

e. Advertiser will reimburse TDI for expertise of providing any required art work, plates production or delivery charges not supplied by Advertiser.

f. Advertiser agrees to call for and remove all advertising or display material immediately after period of its display and further agrees that without liability, TDI is authorized to remove and dispose of any such material that is not so called for.

IV. CANCELLATION

a. Unless otherwise specified on the face hereof and except for V. below, this contract is not subject to cancellation by Advertiser and may not be assigned by Advertiser without written consent from TDI.

b. If for any cause beyond its control TDI shall cease to have the right to continue the advertising covered by this contract, [or if the Transportation Facility concerned should deem such advertising objectionable for any reason,] TDI shall have the right to terminate the contract and discontinue the service without notice.

c. Loss of service as result of strikes, fire or any other cause beyond the control of TDI shall not constitute a breach of contract but TDI shall have the option of terminating the contract or of providing pro-rata refund or an equivalent extension of term of service.

V. ADVERTISING RATE POLICY

a. All contract advertisers will receive ninety (90) days advance notification of any change in advertising rates. Advertiser may terminate as of the effective rate change date by notification at least thirty (30) days prior thereto.

VI. GENERAL

a. Advertiser agrees to indemnify and save harmless TDI and the Transportation Facility concerned against any liability to which that may be subjected by reason of the advertising required under this contract.

b. TDI agrees to maintain all display in firstclass condition provided that Advertiser, without expense to TDI supplies replacements for any damaged or defaced display material and provides for the replacement and installation of any defective parts or mechanisms.

c. Without assuming any liability for property damage, TDI and the Transportation Facility concerned will provide the same police surveillance and protection to advertiser's material as is normally given to other property on the premises.

d. This contract becomes effective when accepted and executed by TDI in New York City, and contains the full agreement of the parties, and no representation or assurance, verbal or written other than that written herein and on the face hereof or by separate agreement over the signature of an officer of TDI, shall affect or alter the obligation of either party hereto.

e. As used in this Agreement the term Advertiser shall include Advertising Agency or any other agent or licensee of Advertiser as well as the Advertiser.

f. TDI is an equal opportunity employer.

DEFENDANTS' EXHIBIT K

TOWARDS SELF-SUFFICIENCY
IN THE YEAR 2000

[LETTERHEAD OF AMTRAK]

NATIONAL RAILROAD PASSENGER CORPORATION
JUNE 1, 1991

SECTION I.

AMTRAK'S SELF-SUFFICIENCY GOAL

Amtrak is a private corporation created by Congress in 1970 to reverse the decline in intercity rail passenger service that nearly resulted in its complete elimination in the preceding decade. Over the next twenty years, with much financial help from the federal government, Amtrak rebuilt or replaced much of the equipment and facilities that it inherited from predecessor railroads. Since 1971, the company has doubled passenger miles and improved its revenue-to-expense ratio by 50 percent. The corporation intends to continue that performance through the 1990s to completely eliminate its federal operating subsidy by the year 2000.

Although Congress has never statutorily directed Amtrak to reach full operational self-sufficiency, it has encouraged the company to operate in as cost-effective manner as possible and make its decisions as if it were profit oriented. Amtrak believes that the corporation must go further and strive to achieve operational self-sufficiency (and eventual full self-sufficiency).

Recently, there have been a number of indications that Amtrak may get more support from the federal government that it did in the 1980s. In the past year, Amtrak was given its first free-standing authorization in over a decade and appropriated significant capital for equipment. In addition, Congress provided $125 million in Northeast Corridor Improvement Project funds primarily to begin the New York-Boston improvements that will permit high-speed service. For the first time in seven years, the Administration recommended some funding for Amtrak in its FY92 Budget.

Amtrak wishes to become fully self-supporting as soon as possible. The corporation's goal to eliminate its federal operating subsidy by the year 2000 was adopted after much thought and review of trends and accomplishments experienced in the 1980s. The full benefit of the intercity passenger rail mode as a method of relieving congestion and improving

the environment cannot be achieved without significant expansion of the Amtrak system. In the current economic environment, however, Amtrak does not believe that the federal government can afford to support major expansion before Amtrak operations are self-sustaining. Overall self-sufficiency would then permit the use of net operating profits from established routes to pay initial losses on expanded service. Amtrak, therefore, views operating self-sufficiency as the next step in a long-range program to develop the full potential of the intercity rail passenger mode and to contribute to the ultimate objective of full profitability. This is consistent with the National Transportation Policy in that it relies less and less on the federal government for support.

Once Amtrak operations are self-sustaining, it may often be less expensive for the federal government to expand the intercity rail system than to provide equivalent capacity in air or highway modes. With a lower capital outlay to provide rail capacity than equivalent capacity in other modes, and no need to subsidize operations, Amtrak can play a major role in balancing the national transportation system and providing an energy-efficient, environmentally-benign alternative to congested airports and highways. It may also be more practical in many cases to provide more rail transportation than it would be to expand highway or airport capacity.

The attainment of operating self-sufficiency will not come without costs. Work rules must be modernized to use the labor force more effectively. New routes that will result in operating losses cannot be established before self-sufficiency is achieved unless states share the costs.

Nonetheless, self-sufficiency is the necessary precondition for expansion, and expansion will produce benefits for several groups. For labor and management employees, cost-effective expansion of the Amtrak system offers the best hope for long-term job security and increased employment. For federal, state and local governments, Amtrak will often offer the most cost effective and achievable intercity transportation improvements. And, because self-sufficiency will be achievable only

if Amtrak provides the highest quality of service to attract passengers, Amtrak's customers, who are also taxpayers, will benefit by receiving the best transportation value for their money.

SECTION II.

PLAN DEVELOPMENT

Amtrak's plan for achieving self-sufficiency is an extension of and addition to the programs and strategies that were successfully employed in the 1980s. Throughout the last decade, Amtrak aggressively marketed an improved product leading to consistent revenue gains that outpaced inflationary and other cost increases. These combined efforts narrowed the gap between expenses and revenues and led to the improvement in the revenue-to-expense ratio.

The planning for and implementation of Amtrak's self-sufficiency goal is a dynamic process. It began rigorously about one and one half years ago with discussions of specific programs and grant reduction estimates involving more than three dozen ideas to reduce the operating subsidy. These were reviewed by top management and responsibility for each program was specifically established at the company's highest levels.

These programs were then incorporated for implementation in Amtrak's detailed annual business plan for Fiscal Year 1991. Recognizing the preliminary nature of the early estimates, the responsible department for each program was tasked to submit confirming capital cost and grant reduction forecasts. This report to Congress is based upon that information as well as a review of all programs by top management in May 1991.

Planning is an ongoing process at Amtrak where it follows an annual cycle leading to a new business plan, operating budget and capital program on October 1 of each fiscal year. New information is continually being collected and incorporated in this planning process, leading to recurring refine-

ment of plans as we learn more about the future. Experience is a good teacher. Attempts to implement new programs occasionally prove to be impractical and require the company to revise its outlook. In addition, new ideas are always being sought to expand the FY2000 "margin of safety" and to offset the effects of programs that are not fully achieved. This is what is meant by dynamic.

Consequently, management does not expect that each of the programs now being pursued will ultimately result in exactly the amount of benefit at exactly the capital cost predicted. Amtrak does expect, however, that the sum of revenue gains and cost containment will remain on track through the year 2000 as a result of this ongoing review and planning process.

SECTION III.

MAJOR ASSUMPTIONS

Amtrak plans to achieve operational self-sufficiency by continuing the successful strategies it pursued in the 1980s. This means continuing aggressive marketing and innovation to prompt revenues to grow at an average rate of 3-4 percent per year more than the rate of increase in expenses. It is not expected that expenses will be reduced. Like the 1980s, it is expected that they will go up modestly as a result of inflation (partially offset by productivity gains) and targeted budget increases necessary to support generation of new revenue.

The programs being added to present methods are intended to ensure the goal is met. While Amtrak is confident that the sum total of new and existing programs, together with ongoing efforts to refine and improve the plan, will result in operating self-sufficiency by FY2000, there are several critical factors beyond Amtrak's control. Since the corporation cannot control them, we need to make some reasonable assumptions about them.

First, Amtrak assumes that, by and large, the economy of the 1990s will be favorable with relatively low unemployment and modest but consistent growth in real personal income.

Amtrak's experience in the 1980s has shown that a program of revenue growth and cost containment (not reduction) is the most feasible path to self-sufficiency. Revenue growth, of course, implies a healthy economy to provide passengers and revenue. Therefore, we must assume that there will be strong demand for good service if the corporation provides it.

Second, Amtrak assumes that there will be substantial and consistent year-to-year capital grant assistance. Despite continual improvement in Amtrak's financial operating performance, the 1980s were years of capital deprivation. Federal capital assistance averaged just $26.9 million per year between FY83 and FY89. New capital grants were only about 17 percent of Amtrak's depreciation. This means that the intercity rail passenger asset base has been severely depleted. The company needs to catch up on these deferred programs and implement some new ones that will contribute to self-sufficiency. While we have resorted to private financing for recent purchases of 104 Horizon Fleet cars, 140 Superliners and 52 locomotives, Amtrak is reaching the limit of what can be financed and still reach self-sufficiency. Therefore, a key assumption underlying Amtrak's goal is the availability of significant capital for equipment acquisition and plant modernization.

Third, we assume that no major new deficit-producing routes will be added. While we will continue to modify and enhance Amtrak's route structure, the additions will be relatively small and incremental, aimed at increasing revenue or improving quality of service. A major new route, with Amtrak expected to absorb multi-million dollar operating losses, would constitute a major setback to the self-sufficiency program.

The final assumption is that Congress will enact Amtrak's legislative proposals to make its costs correctly reflect the requirements of intercity passenger train service. Amtrak seeks relief from the Federal Employers Liability Act and certain tort claims costs that constitute a direct pass-through of expense to the federal government. These proposals, which

will remove $34 million of expenses from Amtrak's books, are detailed more completely in Amtrak's annual legislative report to Congress.

SECTION IV.

OPERATING AND FINANCIAL HISTORY

Amtrak has made great strides in its operating and financial performance since its inception in 1971. Total revenues have increased from $163 million in FY72 to $1.308 billion in FY90. During this period, passenger miles doubled from 3.0 billion to 6.1 billion on the strength of ridership which has increased from 16.6 million passengers to 22.2 million passengers. Average trip length improved from 181 miles to 275 miles during this period. Amtrak also carried 18 million commuter passengers in its contract operations.

On the expense side, total expenses have increased from $310 million in FY72 to $2.012 billion in FY90. Annual train miles operated in FY90 were 33 million miles versus just 26 million miles in FY72. Amtrak system route miles have remained stable at 24,000 miles for the past several years increasing from a low of 22,000 miles in 1972 to a high of 27,000 route miles in 1979 before the route restructuring mandated by Congress. Amtrak now serves 516 stations in 44 states plus the District of Columbia and two Canadian provinces versus 440 stations and 43 states and the District of Columbia served in FY72. In June of this year, Wyoming will become the 45th state when it rejoins the Amtrak system.

In 1972, Amtrak directly employed 1,522 people. Amtrak gradually took over direct responsibility for ticketing, stations, terminal functions, on-board staffing and train and engine crews and today employs over 24,000 people. Assuming direct responsibility at all levels of operations has enabled Amtrak to become more efficient and offer a train service that is consistent throughout the system.

Through efforts with other organizations, Amtrak has been able to increase its revenues. In FY72, revenue from mail

contracts with the United States Postal Service totaled $2.2 million. Amtrak has aggressively pursued new mail contracts and now owns a fleet of mail handling cars to serve its needs. Mail, baggage and express revenues have grown to $38.4 million in FY90 and are projected to increase to $48 million in FY91.

Commuter revenues, from contract commuter operations which Amtrak operates and from fees charged to commuter agencies for access over Amtrak's lines, have grown significantly. In FY90, revenue from contract commuter operations reached $90 million while access fees were nearly $75 million for a combined contribution of $165 million. In the next several years, commuter revenues are expected to grow to $200 million. Ridership for contract commuter operations, which was only 231,000 in FY83 when the state of Maryland service commenced, jumped to over 10 million riders in 1987 with the addition of the Massachusetts Bay Transportation Authority, and has reached 18 million in FY90 with the addition of the Shore Line East service for the state of Connecticut between New Haven and Old Saybrook, and commuter service between Orange County, California and Los Angeles. Service is also expected to begin in FY92 under contract with Virginia Railway Express between communities in Northern Virginia and Washington, D.C.

State-supported 403(b) services have grown considerably since 1972 when only three states were in the program and subsidized three round trips. Today 9 states participate in the 403(b) program, subsidizing 57 trains which operate over 16 different routes, and are expected to contribute $15.8 million in revenue in FY91.

Amtrak's revenue-to-expense ratio has increased dramatically in the last decade. In FY72, the ratio stood at 0.53 but dropped to a low of 0.42 in FY76 with the takeover of the Northeast Corridor. The final FY90 revenue-to-expense ratio was 0.72 and if the recent changes for accounting for excess RRTA and RUIA payments are taken into account, the FY90

ratio would have been 0.77. The goal for the current year is for a ratio of 0.80.

In FY73, systemwide on-time performance reached a low of only 60.2 percent. As new equipment was purchased and relations with the contracting railroads improved, on-time performance peaked at 82 percent in FY83. However, in the mid 1980s on-time performance began to decline as record growth in Amtrak ridership and the pressure on an overworked equipment fleet took its toll. Years of limited capital funding had deprived Amtrak of the number of cars and locomotives needed to provide quality service. On-time performance and the serviceability of equipment suffered and by FY88 on-time performance had declined to 71 percent. Amtrak implemented changes in equipment maintenance and on-time performance has rebounded to its current level of 76 percent in FY90.

In the Northeast Corridor, where Amtrak owns most of the trackage and thus has more direct control over train movements, total on-time performance reached 87.4 percent in FY90 with Metroliner Service trains arriving 91.4 percent on-time. The continued reliability of these trains, particularly the Metroliner Service, is critical for attracting passengers who might otherwise fly or drive.

During the 1980s, a greater emphasis was placed on improving safety. Amtrak was ranked last among all Class I railroads in safety in 1986, but by 1988 was named the winner of the "Most Improved Award." In 1989, Amtrak won the Silver Medal for second place in the E.H. Harriman Safety competition and improved its safety ratio still further in 1990 and received the Bronze Medal. (Another railroad improved its record for the year faster than Amtrak.)

Amtrak's Safety Training Observation Program (STOP), which was implemented systemwide during FY87 and FY88, played an important role in this improvement. Safety teams established at a number of facilities, consisting of both management and agreement-covered employees, work to identify potential safety concerns before accidents happen and to analyze accidents that do happen to prevent their recurrence.

Another important contribution to safety, for employees and passengers alike, has been the start of operation Red Block, a joint labor-management program, which seeks to educate employees about the dangers of drug and alcohol abuse.

These past twenty years have seen Amtrak make great strides in all areas of its financial and operating performance. Continued improvements can be expected in the future in these areas as Amtrak strives for operating self-sufficiency.

SECTION V.

MAJOR STRATEGIES

Amtrak's experience over the last twenty years has provided some valuable lessons in what does and does not work in improving its operating and financial performance. This experience has led the corporation to adopt several broad strategies that guide the formation and implementation of specific self-sufficiency programs.

Our experience shows that it is far more effective to pursue revenue growth while controlling costs in preference to cost reduction as a basic economic strategy. A passenger railroad is largely a fixed cost operation. Even many of its variable costs do not respond proportionately to reductions in service. This means that service reductions cut more into revenue than expenses. Consequently, we have elected to pursue revenue growth while controlling costs, building more and more income on an essentially constant route system while improving the service offered. This is what was done so effectively in the eighties.

We also believe that it would not be desirable to pursue better financial performance at the expense of our employees. Amtrak needs a skilled and motivated workforce to provide the quality of service necessary to reach self-sufficiency. We do not seek wage reductions or deferrals. Our labor relations strategy will consist of the pursuit of **flexibility** in the duties of all employees to ensure maximum responsiveness to the

needs of the customer and in the provision of competitive benefits programs.

SECTION VI.

PROGRAM AREAS

Amtrak has added more than three dozen new programs to its ongoing efforts to eliminate its federal operating subsidy before the turn of the century. The new efforts fall into four broad categories and are somewhat interrelated within those categories. They will complement and enhance the marketing and operating programs that have been, and will continue to be, essential contributors to subsidy elimination. Aggregate benefits and specific programs within each of the categories are discussed in the following sections.

Equipment Replacement

High quality equipment is a very important attribute of customer pleasing rail passenger service. Amtrak still has more than 400 old cars inherited from predecessor railroads, some with almost half a century of service behind them. It is only a matter of time before these cars reach the end of their useful lives. It is imperative to replace them soon.

Fortunately, the fleet replacement program will produce significant operating grant savings as well. In addition, new equipment programs will provide some additional capacity for more customers, enhance productivity and optimize quality of service. These programs are expected to produce about $32 million in operating grant reduction as a result of increased revenues and reduced maintenance expenses. In addition, all new equipment will meet the accessibility requirements of the Americans with Disabilities Act and comply with the waste retention requirements imposed by the National Community Service Act of 1990.

This past April, Amtrak signed agreements to purchase 140 new Superliner cars. The Superliner is a proven product oper-

ated by Amtrak throughout the West for more than 10 years. The cars have higher capacity than single-level cars, allowing the corporation to carry more passengers and generate more revenue in established train-length limits. They also have the highest level of passenger acceptance due to the spacious interiors and excellent views of the scenery that they provide. These cars will replace equipment now in use on the Auto Train, Capitol Limited and City of New Orleans. The purchase will also permit Amtrak to add one sleeping car to each train in the West where demand for service consistently exceeds capacity.

Similarly, subject to the availability of sufficient capital in FY92, Amtrak plans to place an initial order for new design Viewliner cars for all long-distance routes in the East where overhead clearance restrictions preclude the use of double-deck Superliners. Like Superliners (albeit to a lesser degree), Viewliners offer higher passenger capacity per car and lower maintenance expense. Amtrak has had two sleeping cars and one diner undergoing a test program for about two years. These tests are nearly complete and will result in the issuance of a detailed specification for the new cars.

Amtrak also needs to replace its fleet of F40 diesel-electric locomotives that power nearly all trains outside the electrified zone of the Northeast Corridor. Amtrak first acquired F40 units in 1975. While they have been reliable performers, most will be approaching twenty years in service before FY2000. This is past the typical life expectancy of locomotives in main-line service. To make matters worse, Amtrak's passenger locomotives accumulate about double the mileage of freight locomotives of similar design. While the primary reason for replacing F40's is their age, the new locomotives will produce some operating expense reduction. First, they incorporate improved technology that reduces fuel consumption. They also incorporate a system of on-board diagnostics that will assist maintenance personnel in making repairs by automatically identifying defective components. Finally, they

have higher horsepower and will permit Amtrak to run longer trains without always needing to add more locomotives.

The company is exploring options for replacement of Turboliner equipment acquired in the middle 1970s and currently used on the Empire Service. While Turboliners offer top speeds of 110 miles per hour and an especially pleasing aesthetic appearance, they limit growth and inflate expenses. Turboliners are fixed consist trains and cannot be adjusted in size to the different levels of demand on different days of the week. The company is sometimes compelled to operate excess cars and at other times carry large numbers of standees. A flexible consist of coaches and diesel locomotives would be preferable to maximize customer satisfaction and revenue. In addition, Turboliners are unusually expensive to operate, requiring much more fuel than a diesel and more unique and expensive (often foreign) spare parts.

Northeast Corridor

Amtrak has a particularly important responsibility in the Northeast Corridor where it contributes more than anywhere else to the alleviation of congestion and improvement in the environment. The Northeast Corridor is the prototype for development of similar high-density, high-speed services that will increasingly be needed throughout the United States. Northeast Corridor trains operated by Amtrak cover all their operating costs and contribute a substantial operating surplus towards right-of-way maintenance and other fixed corporate expenses. Further improvements to the quality of service on the Corridor can increase this contribution and thereby further reduce Amtrak's need for federal operating subsidy.

During the 1970s, Amtrak and the Federal Railroad Administration rebuilt and re-equipped a great part of the Corridor. Substantial financial improvement followed that work but most of the benefit was on the south end. Nonetheless, the New York-Boston travel market is larger than the New York-Washington market. Amtrak estimates that

it could reduce its operating grant requirements by $74 million in FY2000 if the following improvements are completed.

Subject to the availability of capital, Amtrak plans to improve the north end of the corridor to produce a service much like the service on the south end. This would include all-reserved Metroliner Service trains running between Boston and New York in about three hours. The faster service would result from higher cruising speeds, better acceleration and elimination of an en route locomotive change, following the installation of an electric traction system between New Haven and Boston. Other necessary investments would include infrastructure enhancements between New Haven and New Rochelle on rail lines owned by Connecticut and New York. These improvements include replacement of the obsolete electric traction catenary system, bridge repairs and track improvements. This program is being evaluated in an independent study by the Transportation Systems Center of the U.S. Department of Transportation.

The current generation of Amfleet/AEM-7 Metroliner Service equipment is nearly twenty years old. A significantly more advanced generation of trains is now produced in Western Europe and Japan that is ahead of Amtrak in speed, ride quality and passenger comfort. Some of the Northeast Corridor, primarily south of New York, could sustain the 150 MPH top speeds these trains can produce compared to the 125 MPH service that Amtrak now achieves. This would require, in addition to new trains, some right-of-way improvements, such as a constant-tension catenary system. Also important to the customer is ride quality. Amtrak's Amfleet I cars used in Metroliner Service have suspension systems designed decades ago. Since then new systems have been perfected that would produce a much smoother ride for our passengers. Amtrak proposes to acquire these kinds of trains to replace the current Metroliner Service equipment which would be redeployed to other routes and services. Higher speed service would permit a greater share of the market and higher fares. The related revenue increases would be only partially offset by cost

increases for some added service, yielding significant operating subsidy savings.

Other programs to improve the Northeast Corridor include development of additional, more convenient parking facilities at existing stations. Amtrak also plans to somewhat reduce corridor operating expenses through completion of the Centralized Electrification and Traffic Control System, acquisition of more modern right-of-way maintenance equipment, and developing a system of remote control for drawbridges. Amtrak also is looking at options for reducing excess physical plant on the Harrisburg line.

Revenue Enhancement

Amtrak expects to eliminate about $111 million of operating grant requirement from new and expanded non-intercity rail business ventures. These ventures will be natural extensions of our basic rail transportation business, more fully utilizing Amtrak staff, expertise and assets.

An area of success in the past, and prime candidate for future expansion, is the operation of commuter rail service under contract with transit authorities and state and local governments. Amtrak already generates revenues of about $90 million providing this kind of service in Massachusetts, Rhode Island, Connecticut, Maryland and California. The company has also been designated as operator of the new Virginia Railway Express which is planned for implementation. Amtrak continues to pursue new contracts in Texas, Florida and three locations in California. Local authorities get the benefit of Amtrak's existing management infrastructure, operations and maintenance experience and labor agreements. Amtrak gets full cost recovery plus a significant contribution to offset fixed overhead expense.

Another area of emphasis is further development of the revenue stream earned from real estate. As a byproduct of the basic rail business, Amtrak owns substantial acreage and air rights, often in high value urban areas. Real estate contributed $31 million in revenue to Amtrak in FY90. The company

believes that it can increase this to about $100 million by the year 2000 focusing on its properties in New York, Pennsylvania, Illinois and Washington, D.C. Other properties in other states will contribute as well. Amtrak prefers leases of property in order to get a steady stream of revenue over the long term, rather than sales that produce short-term benefits but deplete the asset base.

Mail and express produced about $38 million in revenue for Amtrak in FY90. Internal studies indicate that Amtrak can significantly increase this by acquiring more mail and express cars and providing mail and express handling facilities at additional important locations. The company also plans to experiment with rail-highway equipment which would, if technologically practical, be more convenient and economical for the U.S. Postal Service to use.

Other smaller programs being pursued include further development of Amtrak's communications business such as extending its fiber optics capacity from New York to Boston.

Productivity Improvement

The last category of projects being developed includes a variety of efforts to improve productivity, in Amtrak's case the relationship between revenues and expenses. Current projections suggest that about $114 million in operating subsidy can be eliminated through higher productivity obtained in large measure by innovative use of information technology.

Better use of existing equipment is a major area of emphasis. Four equipment-related programs are in various stages of implementation to achieve the financial objective shown above. First, Amtrak is installing computer technology similar to major airlines to ensure that every seat is sold at the maximum possible price. This technique, called yield management, was developed by the airlines and is responsible for tens of millions of dollars of revenue to them each year. A related program called fleet allocation uses computer technology to provide the best possible deployment of the fleet to

maximize revenue and profit in the context of demand, price and cost levels.

Two other programs are aimed at increasing the number of cars available for service. One of them focuses on capital improvements to maintenance facilities, especially Beech Grove, to reduce the time cars are out of service for overhaul and running maintenance. The other replaces Amtrak's obsolete material management system and is expected to reduce the number of cars and locomotives out of service awaiting parts through better forecasting of needs at each location.

Amtrak also must have much more flexibility in the use of its workforce. Despite a number of improvements that have been made over the years, a significant number of obsolete and historical practices remain among Amtrak's numerous labor agreements. Had intercity rail passenger service just been invented, no company would organize work the way Amtrak is often compelled to. The company supports suitable financial rewards and financial incentives for all its employees but needs to develop work agreements that are fully responsive to the needs of its customers and the limits of financial support that can be provided by federal, state and local governments.

SECTION VII.

CAPITAL REQUIREMENTS

Amtrak faces the combined problems of a depleted asset base plus additional investments that are necessary to reach self-sufficiency. These needs, including the Northeast Corridor, total $4.6 billion from FY92 through the year 2000. Over 60 percent of that amount or $2.8 billion (including most equipment replacement) would be required to maintain present services and much of that investment should have occurred in the 1980s. This amount is referred to as Amtrak's base requirement. The remainder, totalling $1.8 billion, is required for other projects necessary to achieve self-suffi-

ciency. Over half of that is for improvements to the Northeast Corridor.

The largest components of the capital program outlined in the table below are for equipment and right-of-way. Amtrak has made a significant start with equipment replacement in FY91 by ordering 52 new locomotives and 140 new Superliner cars. Major remaining needs for the rest of the decade include about 250 more locomotives to replace worn out units, about 250 new Viewliners to complete replacement of the Heritage fleet, additional cars to replace Turboliner equipment plus more mail handling cars.

Right-of-way requirements will focus on the Northeast Corridor, for the most part north of New York. These requirements include electrification and related signal and bridge clearance work. Amtrak will also improve curve alignment and superelevation to achieve the best speeds possible on the present alignment. The corporation will delay proposing any major realignment of the Shore Line, probably until after the year 2000, while environmental and historical assessments are completed.

AMTRAK CAPITAL REQUIREMENTS

FY1992 - FY2000

$ Millions

Equipment	2,329
Right-of-Way	1,717
Maintenance Facilities	216
Information/Communications	138
Stations/On-board Service	137
Other	100
Total	4,637

Amtrak has stated that it will match each dollar of federal grant funds for equipment purchases with a dollar of capital borrowed on the private market without federal guarantees. To date, Amtrak has greatly exceeded this goal by privately financing nearly 100 percent of the cost of 104 Horizon Fleet cars, about 80 percent of the cost of 140 Superliners and about 90 percent of the cost of 70 locomotives. As a result, the company is reaching the limit of what it can realistically borrow and still achieve self-sufficiency. Amtrak, therefore, believes that future equipment purchases must be made primarily with grant funds, both to bring the public/private financing ratio back to the 50/50 split initially contemplated, and to ensure the attainment of operational self-sufficiency before the year 2000.

SECTION VIII.

PROJECTED FINANCIAL RESULTS

As outlined in the preceding report, Amtrak has identified many programs that, as a result of substantial capital investment, will contribute to the elimination of its federal operating grant. By the year 2000, together with legislative changes, they will produce grant reductions totalling $365 million. This compares to an FY91 operating grant requirement of $343 million. The balance provides a small margin of surplus that Amtrak has committed towards paying the principal and interest on the new locomotive and car acquisitions currently on the books.

Our plan now projects that Amtrak will be at "break-even" with respect to operating grant requirement in FY2000. Amtrak will continue on an annual basis to review all programs, consider new ideas, incorporate new financing requirements and project revised results. Amtrak is currently projecting the changes in annual grant requirements year-by-year through the year 2000. The corporation will provide these specific forecasts to Congress and the Administration on February 15 of each year in its annual grant request.

Generally speaking, it is anticipated that the greater portion of the grant reduction will come later in the decade since there is a lag time between the commitment of capital investments and the receipt of benefits. In the short run, Amtrak will tighten its operating needs to ensure there is continual year-to-year improvement as there has been in the past.

DEFENDANTS' EXHIBIT L

NATIONAL RAILROAD PASSENGER CORPORATION

FISCAL YEAR 1993
GRANT REQUEST
&
JUSTIFICATION

[LETTERHEAD OF AMTRAK]

FEBRUARY 14, 1992

NATIONAL RAILROAD PASSENGER CORPORATION FISCAL YEAR 1993 GRANT REQUEST

Amtrak requests $631 million of Federal funding in FY93 in order to continue operation of its existing national system, provide funding for both current critical capital needs and to partially fund additional car and locomotive acquisitions required to provide much needed capacity and allow for the continued reduction of Federal support for operations. In addition, Amtrak requests that Congress appropriate to the FRA $146 million to continue the Federally mandated FRA pass through program for non-Amtrak Railroad Retirement and Railroad Unemployment taxes.

Grant Required for Amtrak Operations & Labor Protection—$331 million

Operation of the national system in FY93 will require $331 million of grant funding to supplement an estimated $1,530 million of revenues available for intercity passenger operations.

Grant Required to Support Intercity Passenger Service—$308 million

Amtrak will require $308 million to support its intercity passenger operations. Additionally, Amtrak has provided commuter service under contract to several commuter authorities and anticipates operating new commuter services in California in FY93. As these services produce revenues in excess of their costs, this request reflects over $15 million in reduced Federal support resulting from Amtrak's operations of commuter services.

Grant Required for Other Federally Mandated Requirements—$23 million

Funding of $23 million is required in FY93 to support other Federally mandated Amtrak payments that do not contribute to Amtrak's mission of providing intercity rail

NATIONAL RAILROAD PASSENGER CORPORATION FISCAL YEAR 1993 GRANT REQUEST

passenger service, such as excess claims costs due to FELA ($19 million), and other Federal Excise taxes and FRA user fees paid back to the Federal government ($4 million).

Capital—$300 million

Amtrak's minimum FY93 capital needs total $555 million. It is hoped that private financing and Amtrak self funding will provide $255 million of the total. The remainder will require federal capital support in the amount of $300 million. Of the $555 million, $150 million in Federal funds and $250 million in private financing is designated for new car and locomotive acquisitions.

Grant Required for Non-Amtrak FRA Pass Through Programs—$146 million

Funding of $146 million is required in FY93 to support Federally mandated Amtrak payments that do not contribute to Amtrak's mission of providing intercity rail passenger service. Prior to FY91, Amtrak merely returned these funds to the Federal government in the form of excess Railroad Retirement and Railroad Unemployment Insurance Payments. Beginning in FY91, these funds have been appropriated to the FRA to be paid on Amtrak's behalf.

	(Millions)
excess Railroad Retirement Taxes	$136
excess Railroad Unemployment Insurance	10
	$146

Budget Uncertainties

— Although Amtrak has settled to date with approximately 40 percent of its union work force, the financial impact of ongoing labor contract negotiations for the remaining 60 percent is still unknown. Employee

demands aggregate to over $100 million per year above current levels.

— The length and severity of the current downturn in the economy and its impact on discretionary business and personal travel.

NECIP—$272 million

Amtrak requests an FY93 NECIP grant of $272 million, of which $220 million is for the upgrade of the Boston to New York Corridor. Of the $220 million, $110 million is additional funding for the electrification of the New Haven to Boston rail line, $106 million is for high-speed rail infrastructure improvements between New York and Boston and $4 million is for the X-2000 Tilt Train testing. These improvements are necessary to reduce the travel time between New York and Boston to three hours or less. The remaining $52 million is to continue vital capital improvements to the Northeast Corridor.

($ Millions)

	FY 1992 Budget	FY 1993 Grant Estimate
Revenue Available for Operations	1,432	1,530
Amtrak Expense	1,763	1,861
Total Operating Grant	331	331
Revenue to Cost Ratio	0.82	0.84
Grant Summary		
Amtrak Operations	331	331
Capital Investment	175	300
Total Grant To Amtrak	506	631
Grant to FRA for Non-Amtrak RRTA and RUIA	150	146

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

Operating Expense	FY 1992 Budget	FY 1993 Grant Estimate
Train Operations	471.8	482.5
Maintenance of Equipment	451.0	458.0
Maintenance of Way	209.4	206.0
On-Board Services	177.6	176.9
Stations	128.4	127.1
Marketing & Reservations	190.9	191.7
General Support	148.7	149.5
Insurance and Interest	88.6	88.9
Depreciation	205.1	208.0
General and Administrative	46.5	47.3
Total Operating Expenses	2,118.0	2,135.9
Provision for Inflation		79.5
Total Expense	2,118.0	2,215.4
Less:		
Non-Amtrak FRA Pass Thru Program*	150.2	146.4
Expenses Not Requiring Appropriations	205.1	208.0
Funded Amtrak Expense	1,762.7	1,861.0
Total Revenue	1,440.1	1,550.0
Less:		
Restricted Revenue	7.9	20.0
Revenue Available for Operations	1,432.2	1,530.0
Grant Requirement for Amtrak Operations	330.5	331.0
Revenue Cost Ratio	0.82	0.84

* Pass through of excess RRTA and RUIA.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

Grant Required for Other Federally Mandated Requirements
Operating Expenses

Budget FY92	Estimate FY93	Change
$ 22.5	$ 23.5	$ 1.0

This funding is required to support other Federally mandated requirements that do not contribute to Amtrak's mission of providing intercity rail passenger service. Included in this category are: the excessive costs associated with resolving employee injury claims under the Federal Employers' Liability Act (FELA), which could be significantly reduced under the more equitable and no-fault state workers' compensation laws; the pass back of Federally legislated taxes on railroad diesel fuel and other Federal Excise Taxes and FRA User Fees paid by Amtrak annually.

- FELA—$19.4 Million

  It is estimated that $19.4 million in FELA payments and litigation costs would be saved under state workers' compensation programs. Much of this amount currently benefits FELA attorneys, whose compensation runs from 25% to 40% of the award or settlement.

- Pass Back of Federal Excise Taxes—$4.1 Million

  Included under this category is the funding required to pay Federal Excise Taxes which Amtrak is mandated to pay as a result of current law. Beginning on December 1, 1990, Amtrak became subject to a 2.6 cents per gallon deficit-reduction excise tax on diesel fuel used by railroads, as well as a FRA user fee paid by Amtrak for the safety inspection program. In addition, Amtrak is subject to a tax of 14 cents per gallon on gasoline, and a 4% excise tax on off-shore insurance premiums.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

Grant Required for Other Federally Mandated Requirements
Operating Expenses

These amounts represent payments by Amtrak to the Federal government which result in no net outlay of federal funds.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

Grant Required for Non-Amtrak FRA Pass Through Programs
Operating Expenses

Budget FY92	Estimate FY93	Change
$ 150.0	$ 146.4	$ (3.6)

This funding is required to support Federally mandated passenger railroad payments, which FRA has been directed to pay on Amtrak's behalf since FY91. These payments represent the amounts that Amtrak must annually contribute to the Railroad Retirement trust fund in excess of Amtrak's liability for benefits to its retirees and other beneficiaries and for the Railroad Unemployment Repayment Tax.

- Railroad Retirement—$136.2 Million

  Current law requires that Amtrak and its employees pay Tier II and supplemental taxes that will total an estimated $189.9 million for FY93.

  Benefits paid to individuals who retired from Amtrak and to their beneficiaries will be approximately $53.7 million, as estimated by the Railroad Retirement Board, leaving an excess payment of $136.2 million.

- Railroad Unemployment—$10.2 Million

  Current law requires Amtrak to pay annually an estimated $10.2 million per year of Railroad Unemployment repayment tax. This $10.2 million represents the amount to be paid by FRA on behalf of Amtrak.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

TRAIN OPERATIONS
Operating Expenses

Budget FY92	Estimate FY93	Change
$ 471.8	$ 482.5	$ 10.7

Train Operations includes the engineers and conductors who operate approximately 250 trains nationally over 25,000 route miles; fuel and electricity; joint terminals; and all operational communications and train control costs associated with our system. Approximately 7% covers the contractual costs of the 17 railroads that provide services for the operation of Amtrak trains.

Amtrak employs approximately 4,400 people to operate a system that provides service to over 500 towns and cities and contractual commuter services for California, Connecticut, Massachusetts, Maryland and Virginia. This work force includes approximately 3,300 Trainmen and Enginemen, 470 managerial, supervisory and clerical staff, and over 560 personnel involved in other functions, such as block and tower operations, dispatching and train control.

In light of Amtrak's commitment to its passengers' comfort and safety, the Swedish "Tilt" train equipment is anticipated to be tested in revenue service in the Boston-New York corridor in FY93. This equipment automatically tilts as it enters curves, countering the centrifugal force that passengers feel, which improves the comfort and quality of the ride.

In an effort to minimize severe fluctuations in fuel costs, Amtrak has entered into a special fuel procurement program. Approximately 30% of Amtrak's fuel requirements are currently covered by this program.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

TRAIN OPERATIONS
Operating Expenses

The forecasted increase of $10.7 million primarily reflects the impact of the expansion of Amtrak's commuter operations which are fully covered by revenues. Amtrak is slated to begin Virginia's commuter service in Spring 1992, and final negotiations are under way to begin Southern California's commuter service in Fall 1992. Amtrak is also under consideration as operator for the California's Peninsula Commuter service. Other expenses are for new state supported services in North Carolina and California, and the extension of the Sunset Limited offset by productivity savings and the anticipated work rule changes for cross craft manpower utilization.

Costs are in constant FY92 dollars. The estimated FY93 inflation rate is explained on page 19.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

MAINTENANCE OF EQUIPMENT
Operating Expenses

Budget FY92	Estimate FY93	Change
$ 451.0	$ 458.0	$ 7.0

In order to provide a viable, safe and reliable fleet, Amtrak maintains it's equipment on a regular basis. The costs associated with equipment maintenance are routine maintenance and cleaning at the end of each trip, preventive maintenance programs, overhauls and equipment conversions, and maintenance provided under contract with commuter agencies. Direct employment levels anticipated to perform these maintenance functions are approximately 6,400; 89% of the personnel are involved in direct Amtrak operations and 11% of the personnel are related to Amtrak's fully reimbursable contract operation of commuter services for California, Connecticut, Massachusetts, Maryland, and Virginia.

Amtrak utilizes efficient production line techniques in its major heavy overhaul maintenance facilities in Indiana and Delaware, and operates other facilities across the system for repairs and preventive maintenance of cars and locomotives. Amtrak is committed to providing the best possible equipment for the safety and comfort of the passengers. As part of this commitment we are planning to increase the heavy overhauls in FY93 to 439 units, 370 cars (Amfleet, Superliner and Heritage) and 69 locomotives (17 electric and 52 diesel). To enhance reliability and performance, 50 "state of the art" DASH-8 locomotives will be placed into service over the next two years. These new fuel efficient locomotives are quieter, emit lower levels of pollution, and the latter 30 to be delivered will be significantly more aerodynamic in style. For passenger comfort, 140 of our popular Superliner cars will be delivered in late FY93.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

MAINTENANCE OF EQUIPMENT
Operating Expenses

The $7.0 million forecasted increase primarily reflects the cost of additional fully reimbursed commuter services in California and Virginia. Other expenses are for new state supported services in North Carolina and California and the extension of the Sunset Limited to Miami.

Costs are in constant FY92 dollars. The estimated FY93 inflation rate is explained on page 19.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

MAINTENANCE OF WAY
Operating Expenses

Budget FY92	Estimate FY93	Change
$ 209.4	$ 206.0	$ (3.4)

The Maintenance of Way program includes the maintenance of tracks, communications and signal systems, electrification systems, buildings, bridges, tunnels, and all other roadway facilities under Amtrak's ownership. Direct employment is expected to be approximately 3,300. This includes both personnel related to Amtrak's operations and the operations under fully reimbursed commuter service agreements. This program also includes payments to operating railroads for similar costs.

The major portion of Maintenance of Way expense is incurred on Amtrak owned properties primarily in the Northeast Corridor. Over 20% of this program is for fully reimbursable maintenance provided under contractual agreements with various state and commuter agencies. An estimated 7% covers payments to freight railroads for use of their track. The remainder covers maintenance of Amtrak's off-corridor track in New York and Michigan and yards in Louisiana, California, Illinois and Florida.

Amtrak is continuing to work on a priority basis to improve and, where feasible, eliminate grade crossings in order to reduce crossing accidents. Programs to maintain and improve ride quality, interlockings, and monitor performance of our high speed surfacing gangs are also continuing. Amtrak is in the third year of the Concrete Tie Replacement Program and is continuing to perform extensive track renovation in New York City as part of a joint venture with Long Island Railroad.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

MAINTENANCE OF WAY
Operating Expenses

The $3.4 million decrease in expenditure primarily reflects the impact of productivity saving implemented throughout the system and work rule changes we anticipate to obtain from new contracts.

Costs are in constant FY92 dollars. The estimated FY93 inflation rate is explained on page 19.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

ON-BOARD SERVICES
Operating Expenses

Budget FY92	Estimate FY93	Change
$ 177.6	$ 176.9	$ (0.7)

On-Board Services has approximately 3,000 Coach and Sleeping Car Attendants, Waiters, Chefs, and Stewards who serve our passengers once they board the trains. These employees work on over 325 food service cars, such as diners, dinettes, buffet cars, and snack cars, as well as coaches and sleepers. This program also includes the operation of 16 commissaries and 13 crew bases required to support food service functions.

Labor, including benefits, accounts for 69% of the program cost with the remainder covering food, beverages, and supplies. Estimated FY93 program costs are as follows:

	Labor	Other	Total
Food and Beverage Service	$77.0	$ 46.7	$123.7
Coach Service	17.3	1.5	18.8
Sleeping Car Service	15.1	3.6	18.7
Other On-Board Support	12.4	3.3	15.7
TOTAL	$121.8	$ 55.1	$176.9

The overall decrease in expenditures reflects the impact of productivity enhancements and work rule changes implemented in FY92 regarding part-time labor and the anticipated impact of cross craft manpower utilization. These savings offset cost increases for state supported North Carolina service, the extension of the Sunset Limited to Miami, and selected modifications of china service as a result of the positive responses we have received from our passengers. China

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

ON-BOARD SERVICES
Operating Expenses

service is currently available on Auto Train, Capitol Limited, Coast Starlight, and the Southwest Chief.

Costs are in constant FY92 dollars. The estimated FY93 inflation rate is explained on page 19.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

STATIONS
Operating Expenses

Budget FY92	Estimate FY93	Change
$ 128.4	$ 127.1	$ (1.3)

This program incorporates the operation of stations and includes ticketing, baggage and express handling. All expenses of station operation such as labor, rent, utilities and routine maintenance are also included.

The proposed FY93 route structure assumes operation of approximately 514 manned and unmanned stations. Of these, 83 are owned by Amtrak, and 431 are owned by other railroads, cities or private interests. In FY91, a total of 15 new stations were added in California, Colorado, Indiana, Ohio and Wyoming.

There are 249 staffed stations of which 230 stations are manned by approximately 2,300 Amtrak employees and the remaining 19 stations are manned by railroad personnel. The Ticketing function comprises 65% of the work force, Mail, Baggage and Express 23%, and the remaining 12% is for Station Operations, Maintenance, and Managerial and Support. Amtrak trains stop at an additional 265 unmanned locations.

Amtrak is continually working to transform its stations into modern and efficient facilities similar to Washington Union Station. Amtrak's facility in Chicago was completed in October 1991 and work is continuing on Penn Station New York. Additionally, Amtrak is upgrading its stations to comply with the accessibility requirements of the Americans with Disabilities Act.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

STATIONS
Operating Expenses

A new contractual feature of the Transportation Communications Union agreement allows Amtrak to utilize part-time employees throughout the system and will reduce station costs over the next several years as the program is implemented.

Costs are in constant FY92 dollars. The estimated FY93 inflation rate is explained on page 19.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

MARKETING & RESERVATIONS
Operating Expenses

Budget FY92	Estimate FY93	Change
$ 190.9	$ 191.7	$ 0.8

This program includes Amtrak's use of various Marketing and Sales elements to create and enhance our products and services to increase overall consumer awareness and demand. The elements include advertising, sales promotion, product design and packaging, pricing, distribution, reservations, sales and sales development. Approximately 1,600 personnel are employed to perform these functions.

The Advertising and Sales Promotion Programs are important to expand, enhance and strengthen the ever increasing popularity of passenger rail travel. The advertised message presented to the consumer through the various mediums helps Amtrak to maintain its posture in the marketplace and support the revenue objectives in a very competitive environment. Our sales promotion efforts permit us to target messages through selected media and to offer special incentives to the consumer or the sales agent in order to stimulate sales of particular products at particular times. For the past few years, Amtrak has been able to increase its revenue at rates above those of the domestic airline industry. Amtrak has initiated a new Senior Citizen fare program on most of its trains which offers senior citizens a 15% discount off the lowest available railfare for mid-week travel.

During FY92 Amtrak expects to receive over 37.7 million calls and handle 94% of those calls through our reservation sales systems. The ability to convert incoming telephone inquiries into sales by providing a superior quality telephone

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1992 BUDGET JUSTIFICATION

($ Millions)

MARKETING & RESERVATIONS
Operating Expenses

sales service is foremost in our Marketing Plan. This will be accomplished at our four reservation offices in Fort Washington, PA, Chicago, IL, Corona, CA, and Los Angeles, CA, and through our automated call response system. The FY93 call volume is expected to increase about 2% over FY92.

The increase reflected in the FY93 estimate is related to the start-up advertising for our new Trans-Continental route which will extend the Los Angeles to New Orleans Sunset Limited through Jacksonville to Miami.

Costs are in constant FY92 dollars. The estimated FY93 inflation rate is explained on page 19.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

GENERAL SUPPORT
Operating Expenses

Budget FY92	Estimate FY93	Change
$ 148.7	$ 149.5	$ 0.8

The General Support program includes service and supervisory functions which directly support operations.

This program incorporates the procurement and material control function, revenue accounting, police, training and other activities. In addition, this program provides for the operation of the corporate computer system and field personnel offices. Labor and benefits account for approximately 66% of the program with the remainder covering communication costs, travel, rents, and other office related expenses.

Direct employment levels are anticipated to be 1,700 consisting of approximately 800 union and 900 nonunion employees. This employment level includes personnel needed to sustain new commuter services in California which are fully funded by the state and do not require any Federal funds.

Overall costs of this program are estimated to increase $0.8 million as a result of fully reimbursed administrative and overhead costs associated with new commuter services.

Costs are in constant FY92 dollars. The estimated FY93 inflation rate is explained on page 19.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

INSURANCE AND INTEREST
Operating Expenses

Budget FY92	Estimate FY93	Change
$ 88.6	$ 88.9	$ 0.3

The program includes expenses for personal liability and property damage insurance and for interest expense.

The forecasted increase of $0.3 million reflects debt service on new equipment purchases which is partially offset by reduced FELA claims resulting from our safety program.

Costs are in constant FY92 dollars. The estimated FY93 inflation rate is explained on page 19.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

DEPRECIATION
Operating Expenses

Budget FY92	Estimate FY93	Change
$ 205.1	$ 208.0	$ 2.9

Depreciation cost is a direct function of the value and estimated life of depreciable corporate assets. The total expense is a product of asset acquisition cost and depreciation rates which are based on the estimated useful life.

The $2.9 million increase results from the receipt of new equipment in FY92 and FY93, and additional capitalization of Northeast Corridor improvements.

This program requires no cash outlays and therefore does not impact the operating grant requirement.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

GENERAL AND ADMINISTRATIVE
Operating Expenses

Budget FY92	Estimate FY93	Change
$ 46.5	$ 47.3	$ 0.8

This program includes the administration and overhead functions of the corporation, the majority of which are performed at corporate headquarters. This represents about 2% of Amtrak total costs.

The program covers the expenses of the Board of Directors, President's Office, Internal Affairs, Corporate Planning, Government Affairs, Corporate Communications, Law, Labor Relations, Headquarters personnel functions and most financial operations. Of the estimated $47.3 million, $19 million is to provide legal and claims support.

The $0.8 million increase primarily reflects fully reimbursable administrative and overhead costs associated with new commuter services in California.

Costs are in constant FY92 dollars. The estimated FY93 inflation rate is explained on page 19.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

GENERAL AND ADMINISTRATIVE
Office Of Internal Affairs (IG)
Operating Expenses

Budget FY92	Estimate FY93	Change
$ 4.8	$ 4.9	$ 0.1

Included under the major program General and Administrative is the Internal Affairs Department.

The Department has the responsibility of conducting and supervising audits and investigations related to the programs and operations of Amtrak. The department consists of three major areas (Inspector General, Policy Procedure Resource & Audits and Criminal Investigations) with a fully dedicated staff of 70.

Labor and benefits account for approximately 89% of the department's budget with the remaining covering travel, professional services, and other related expenses.

The $0.1 increase is to upgrade computer technologies in order to maximize efficiency of audits and support the expansion of computerized audits.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

REVENUE

Budget FY92	Estimate FY93	Change
$ 1,440.1	$ 1,550.0	$ 109.9

FY93 revenue is projected to increase $109.2 million (7.6%) over the FY92 level. Most of this increase ($56.7 million or 52%) is in Passenger Related revenue, which is 5.5% greater than FY92. New commuter services for Southern California and the San Francisco area will increase revenues by $44.4 million. In FY93, the Passenger Related revenue increase is attributable to: 1) proposed state supported services in North Carolina and California and the proposed extension of the Sunset Limited to Miami; and 2) higher yield due to rate increases. In terms of year-to-year growth, an anticipated economic recovery should result in a moderate 1.0% improvement in passenger miles.

	FY92		FY93	
	$	% of Total	$	% of Total
Passenger Related	1,035.0	71.8	1,091.7	70.4
Commuter Operations	107.2	7.4	150.9	9.7
Commuter Fees	80.1	5.6	83.2	5.4
State Payments	21.3	1.5	23.6	1.5
Mail Baggage & Express	47.2	3.3	52.4	3.4
Real Estate & Operations	46.7	3.2	44.0	2.8
Freight	13.9	1.0	15.4	1.0
Interest	6.8	0.5	5.7	0.4
Operations & Mntce. Svcs.	49.3	3.4	50.5	3.3
Miscellaneous	32.6	2.3	32.6	2.1
TOTAL	1,440.1	100.0	1,550.0	100.0

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 BUDGET JUSTIFICATION

($ Millions)

Provision for Inflation Increase
Operating Expenses

Budget FY92	Estimate FY93	Change
$ —	$ 79.5	$ 79.5

Amtrak's inflation estimate of 4.5% is based upon the impact of recent settlements of approximately half our union work force and the anticipated impact of settling the remaining contracts at rates comparable to those recently signed. This estimated increase is caused by the fact that elements of those settlements involve larger increases in the earlier years of the contracts to compensate for the extended negotiation process.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 CAPITAL BUDGET JUSTIFICATION

Amtrak's minimum FY93 capital requirements total $555 million. Of this amount, it is estimated that $255 million will be provided through a combination of internal sources and outside financing, leaving a Federal grant requirement of $300 million. Approximately $150 million in Federal funds and $250 million in private financing is designated for new equipment acquisition. Amtrak's ability to purchase new equipment is, of course, contingent upon the ability to secure outside financing. The added capacity provided by the new equipment is expected to generate out-year incremental revenue sufficient to cover operating costs, and support the continued reduction of Federal funds required for operations.

The projects selected for funding in the proposed FY93 capital plan represent the highest priority requirements. It was necessary to defer several programs from FY92 to FY93 due to lack of capital resources.

The major programs comprising Amtrak's minimum FY93 capital requirements are:

	(Millions)
Rolling Stock	$410
Rolling Stock Modifications	37
Maintenance Facilities	34
Right-of-Way	30
Information & Communication Systems	11
Stations/On-Board Services	14
Other Projects	19
Total Capital Requirements	$555
Less: Outside Financing	(250)
Self-Generated Funds	(5)
FY93 Capital Grant Requirement	$300

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 CAPITAL BUDGET JUSTIFICATION

While total amounts are shown for each major program, details are provided for major items only.

I. Rolling Stock (New)—$410 million

Amtrak's equipment acquisition plan includes the purchase of the following new locomotives, passenger cars, and material handling cars:

1) Forty diesel locomotives to replace current units approaching the end of their useful life, and ten new dual-mode locomotives to replace Turboliner equipment operating in the Empire Service.

2) Fifty Viewliners to replaced Heritage equipment operating in the East in long-distance service.

3) Thirty-nine additional Superliner cars to increase service in the South and West.

4) Twenty-three Horizon cars to replace Turboliner equipment operating in the Empire Service.

5) Sixty material handling cars to substantially increase business with the U.S. Postal Service, thus affording the opportunity for increased revenues in this area.

New equipment also includes the principal and capitalized interest payments on past purchases. For FY93, $10 million is included for a locomotive principal payment and a Superliner capitalized interest payment.

II. Rolling Stock Modifications—$37 million

Covers equipment modification and enhancement programs required to upgrade the fleet and provide full waste retention disposal systems and disposal facilities.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 CAPITAL BUDGET JUSTIFICATION

III. Maintenance Facilities—$34 million

Continues the modernization program at several of Amtrak's major maintenance facilities, necessary for the efficient operation and preservation of Amtrak's equipment. The plan also includes $1 million for safety and environmental projects necessary at these same facilities, as well as, $2 million for the Sunnyside Yard Car Washer, jointly funded with New Jersey Transit.

IV. Right-of-Way—$30 million

Continues Amtrak's efforts to ensure the safe operation of high speed trains on the Northeast Corridor. The plan includes track surfacing and bridge improvements plus approximately $17 million to complete the replacement of numerous defective concrete ties acquired from the now bankrupt Lonestar Corporation.

V. Information and Communications Systems—$11 million

Includes the upgrade and replacement of IBM mainframe computer equipment required to expand capacity and improve the reliability, availability and performance of our business and reservation systems. Also includes the replacement of obsolete disk storage devices at the data center and equipment needed to implement the Labor Management System.

VI. Station/On-Board Service Improvements—$14 million

Provides for the Metropark Parking Garage project, and improvements to the Washington Union Station satellite commissary and test kitchen, Los Angeles Union Station and several other stations.

NATIONAL RAILROAD PASSENGER CORPORATION
FISCAL YEAR 1993 CAPITAL BUDGET JUSTIFICATION

VII. Other Projects—$19 million

Provides for the annual vehicle replacement program, Sunnyside Yard Masterplan, the initial costs of new mail handling facilities, and enhancements to existing facilities. Also includes costs for construction of New York Division office space and projects to further comply with the Americans with Disabilities Act.

NATIONAL RAILROAD PASSENGER CORPORATION
NORTHEAST CORRIDOR IMPROVEMENT PROJECT
(NECIP)
FISCAL YEAR 1993 NECIP BUDGET JUSTIFICATION

Amtrak requests an FY93 NECIP grant of $272 million. This amount includes funding for upgrade of the New York to Boston Corridor, including electrification of the New Haven to Boston rail line, infrastructure improvements and X-2000 trainset testing and demonstration. Also, funding is requested to continue capital improvements between New York and Washington.

The upgrade of the New York to Boston corridor includes a turnkey contract for construction of the electric traction system between New Haven and Boston. Several infrastructure improvements are also necessary to generate reductions in travel time. These are: installation of right of way fencing in selected urban areas, bridge conversion and upgrade, track undercutting, four high-speed universal interlockings, rearrangement of track layouts, repairs to Canton Viaduct, and concrete tie purchase and installation. Amtrak also plans to start work on a toilet dump system and car washer in Boston.

Capital improvements needed between Washington and New York include: New York Penn Station tunnel and yard improvements, interlocking reconfiguration and turnout rehabilitation, electric traction system upgrades, and communication and signal system upgrades.

Major programs totals are listed below:

New York to Boston	(Millions)
Electrification	$ 110.0
X-2000 Trainsets	4.0
Infrastructure	71.5
Planning, scheduling and overall management	16.0
Contingency	18.5
TOTAL	$ 220.0

NATIONAL RAILROAD PASSENGER CORPORATION
NORTHEAST CORRIDOR IMPROVEMENT PROJECT
(NECIP)
FISCAL YEAR 1993 NECIP BUDGET JUSTIFICATION

Washington to New York	(Millions)
New York Penn Station Tunnel/Yard Improvements	$ 8.0
Interlocking Reconfiguration and Turnout Rehabilitation	7.0
Electric Traction System Upgrades	27.5
Communication and Signal System Upgrades and track and facility renewal	9.5
TOTAL	$ 52.0
TOTAL FY93 NECIP REQUEST	$ 272.0

New York to Boston—$220.0 million

Includes the following items for upgrade of the New York to Boston Corridor:

— Turnkey contract for construction of electric catenary system between New Haven and Boston, and the acquisition of any necessary real estate.

— Lease, operate, test and demonstrate the X-2000 modern, hi-speed trainsets, for possible use in Boston to Washington service.

— Infrastructure improvements; installation of right of way fencing in selected urban areas, bridge upgrades, high-speed universal interlockings, arrangement of track layouts through New Haven and Stamford, vertical improvements at bridges for electrification, installation of a toilet dump manifold system at Boston South Station, car washer construction, and purchase and installation of concrete ties.

NATIONAL RAILROAD PASSENGER CORPORATION
NORTHEAST CORRIDOR IMPROVEMENT PROJECT
(NECIP)
FISCAL YEAR 1993 NECIP BUDGET JUSTIFICATION

— Plan, schedule, and overall management of the high speed service improvements, and provide a project reserve.

Washington to New York—$52.0 million

Includes the following items for upgrades in the Washington to New York Corridor:

— Improvements in New York Penn Station Tunnel and Yard to include the design of an emergency air system for pumps and improvements to emergency exit stairs in shafts, as well as, construction of track level walking surface.

— Interlocking reconfiguration and turnout rehabilitation.

— Initial phase of the replacement of the Richmond generation station and purchase of transformers and related equipment which is part of the multi-year electric traction system upgrade program.

— Communication and signal system upgrades, and renewals of tracks and facilities at New York Penn Station and Sunnyside Yard.

DEFENDANTS' EXHIBIT M

* * *

NEW YORK BOARD OF TITLE UNDERWRITERS
FORM 100E

8701-00734

CHICAGO TITLE INSURANCE COMPANY

in consideration of the payment of its charges for the examination of title and its premium for insurance, insures the within named insured against all loss or damage not exceeding the amount of insurance stated herein and in addition the costs and expenses of defending the title, estate or interest insured, which the insured shall sustain by reason of any defect or defects of title affecting the premises described in Schedule A or affecting the interest of the insured therein as herein set forth, or by reason of unmarketability of the title of the insured to or in the premises, or by reason of liens or encumbrances affecting title at the date hereof, or by reason of any statutory lien for labor or material furnished prior to the date hereof which has now gained or which may hereafter gain priority over the interest insured hereby, or by reason of a lack of access to and from the premises, excepting all loss and damage by reason of the estates, interests, defects, objections, liens, encumbrances and other matters set forth in Schedule B, or by the conditions of this policy hereby incorporated into this contract, the loss and the amount to be ascertained in the manner provided in said conditions and to be payable upon compliance by the insured with the stipulations of said conditions, and not otherwise.

In Witness Whereof, CHICAGO TITLE INSURANCE COMPANY has caused this policy to be signed and sealed as of the date of policy shown in Schedule A, the policy to become valid when countersigned by an authorized signatory.

Issued by:
EASTERN REGION
MAIN OFFICE
233 Broadway
New York, New York 10279-0014
(212) 815-9300

CHICAGO TITLE INSURANCE COMPANY
/s/ [ILLEGIBLE]
President.

ATTEST:
/s/ [ILLEGIBLE]
Secretary.

[CORPORATE SEAL]

N.Y.B.T.U. FORM

gmw

Number	Date of Isue	Amount of Insurance
8701-00734	August 10, 1988	$40,000,000.00

Name of Insured: NATIONAL RAILROAD PASSENGER CORPORATION

The estate or interest insured by this policy is fee simple vested in the insured by means of

SEE ATTACHED CERTIFICATION:

SCHEDULE A

The premises in which the insured has the estate or interest covered by this policy is described on the description sheet annexed.

SCHEDULE B

The following estates, interests, defects, objections to title, liens, and incumbrances and other matters are excepted from the coverage of this policy.

1. Defects and incumbrances arising or becoming a lien after the date of this policy, except as herein provided.

2. Consequences of the exercise and enforcement or attempted enforcement of any governmental, war or police powers over the premises.

3. Any laws, regulations or ordinances (including, but not limited to zoning, building, and environmental protection) as to the use, occupancy, subdivision or improvement of the premises adopted or imposed by any governmental body, or the effect of any noncompliance with or any violation thereof.

4. Judgments against the insured or estates, interests, defects, objections, liens or incumbrances created, suffered, assumed or agreed to by or with the privity of the insured.

5. Title to any property beyond the lines of the premises, or title to areas within or rights or easements in any abutting

streets, roads, avenues, lanes, ways or waterways, or the right to maintain therein vaults, tunnels, ramps or any other structure or improvement, unless this policy specifically provides that such titles, rights, or easements are insured. Notwithstanding any provisions in this paragraph to the contrary, this policy, unless otherwise excepted, insures the ordinary rights of access and egress belonging to abutting owners.

6. Title to any personal property, whether the same be attached to or used in connection with said premises or otherwise.

7. Rights of present tenants, lessees or parties in possession.

8. The lien of street vault charges as set forth in Exception 32 of this Schedule B.

Policy excepts the possible future imposition of charges for vaults which were either not assessed or improperly assessed at or prior to the date of closing.

9. Liens pursuant to the Administrative Code of the City of New York may have attached and not been filed or recorded. No liability is assumed for same.

10. A) With respect to such portions of Penn Station as are shown on the following surveys made by Earl B. Lovell-S.P. Belcher, Inc.:

continued-

Countersigned
/s/ [ILLEGIBLE]
Authorized Signatory

NOTE: ATTACHED HERETO ADDED PAGES.

* * *

DEFENDANTS' EXHIBIT N

[LETTERHEAD OF WINSTON NETWORK, INC.]

June 23, 1988

Mr. Bruce Bourque
Project Manager
National Railroad Passenger Corp.
Real Estate Department
400 North Capital St., NW
Washington DC, 20001

Re: Penn Station Spectacular

Dear Bruce:

This letter shall serve to confirm the exclusive advertising arrangement we discussed between Winston Network Inc. ("Winston"), on the one hand and National Railroad Passenger Corporation ("Amtrak") on the other, concerning the above mentioned location.

Commencing October 1, 1987, Winston agrees to pay to Amtrak a minimum rent of $2,600.00 per month for two (2) months; $6,338.00 per month for six (6) months commencing December 1, 1987; and $7,458.75 per month for twelve (12) months commencing June 1, 1988. In addition, Winston agrees to pay an electrical charge of $2,200.00 per month during the term of this agreement commencing November 1, 1987.

This Agreement shall run from year to year. Either party may terminate this Agreement on thirty (30) days written notice to the other.

If the above is acceptable, please indicate same by signing in the space provided below.

As always, we look forward to a long and mutually beneficial relationship.

Sincerely yours,

/s/ VINCENT NOTARO
Vincent Notaro
Senior Vice President

Agreed and Accepted:
NATIONAL RAILROAD PASSENGER CORP.

BY: _____

DATE: _____

VN:DM

DEFENDANTS' EXHIBIT O

[LETTERHEAD OF TDI]

August 3, 1979

Mr. Fred Golden
Ash/LeDonne
1500 Broadway
New York, New York

RE: Contract / Resorts International
Penn Station Spectacular

Dear Fred:

This letter is to confirm our conversation and understanding regarding the TDI advertising contract for Resorts International for the Penn Station Spectacular.

As discussed, it is understood and fully agreed to that this contract is completely contingent upon its acceptance by the railroad authorities, in this case Amtrak. The railroad has complete and total right to accept or reject the contract, the rates, the copy and in short, anything pertaining to use of railroad facilities.

We certainly hope that we will be able to have the contract in question accepted by the railroad and we intend to do everything that we can do to achieve that goal. We will keep you posted on the progress of our discussion.

Sincerely,

/s/ BOB NEUBERGER
Bob Neuberger
Account Supervisor

BN:jhs

cc: Peter LeDonne

[LETTERHEAD OF TDI]

TDI ADVERTISING CONTRACT DATE AUGUST 1, 19

The undersigned hereby authorizes TRANSPORTATION DISPLAYS, INC. hereinafter referred to as TDI to display the following described advertising for which said Advertiser agrees to pay

the sum of THIRTEEN THOUSAND DOLLARS ** (SEE ATTACHMENT)
Net in advance during the term of the Contract:

Dollars ($ 13,000) Per MONTH
(FIRST YEAR)

SUBJECT OF ADVERTISEMENT RESORTS INTERNATIONAL

MEDIUM: Car Cards ____ Posters ____ Timetables ____

Dioramas ___ Exhibits __ Islands ___ Other SPECTACULAR

Commencing JANUARY 1 1980 For FIVE YEARS

Size of Showing ONE Size of Display _____

Location PENNSYLVANIA STATION

Position OVER AMTRAK TICKET WINDOWS

Copy Changes AT ADVERTISERS EXPENSE AND DISCRETION

Service Charges ADVERTISER RESPONSIBLE FOR ALL CHARGES CONNECTED WITH INSTALLATION OF THE TRANSPARENCY AS WELL AS ELECTRICAL SERVICE AND CHARGES.

REMARKS ABOVE RATE SUBJECT TO 15% AGENCY COMMISSION. ADVERTISER RESERVES THE OPTION TO RENEW THIS CONTRACT IF DESIRED, RATES WILL BE SUBJECT TO NEGOTIATION. ADVERTISER RESERVES THE RIGHT TO CANCEL THIS CONTRACT WITH 6 MONTHS PRIOR WRITTEN NOTIFICATION.

THIS CONTRACT IS EXECUTED IN DUPLICATE BY THE UNDERSIGNED ADVERTISER OR AGENCY AND ACCEPTED BY TDI SUBJECT TO CONDITIONS PRINTED ON THE REVERSE SIDE.

ACCEPTED 8/1 19 79

TRANSPORTATION DISPLAYS, INC.

BY /s/ [illegible]

Sales Representative BOB NEUBERGER

NEW YORK, NEW YORK

ASH/LEDONNE ADVERTISING, INC
Advertiser or Agency

By /s/ [illegible]

Street 1500 BROADWAY

City NEW YORK, NEW YORK

Telephone Number 221-0140

ATTACHMENT

FIRST YEAR OF CONTRACT	$13,000 PER MONTH
SECOND YEAR OF CONTRACT	$13,500 PER MONTH
THIRD YEAR OF CONTRACT	$14,000 PER MONTH
FOURTH YEAR OF CONTRACT	$14,500 PER MONTH
FIFTH YEAR OF CONTRACT	$15,000 PER MONTH

THIS ATTACHMENT IS PART OF THE ADVERTISING CONTRACT WRITTEN AUGUST 1, 1979, BETWEEN RESORTS INTERNATIONAL, ASH/LEDONNE ADVERTISING, INC AND TRANSPORTATION DISPLAYS, INC.

[LETTERHEAD OF TDI]

TDI ADVERTISING CONTRACT DATE JANUARY 3, 19

The undersigned hereby authorizes TRANSPORTATION DISPLAYS, INC hereinafter referred to as TDI to display the following described advertising for which said Advertiser agrees to pay

the sum of THIRTEEN THOUSAND ** (SEE RIDER "A" ATTACHED)
Net in advance during the term of the Contract:

Dollars ($ 13,000) Per MONTH
(FIRST YEAR)

SUBJECT OF ADVERTISEMENT ASH/LEDONNE ADVERTISING, INC

MEDIUM: Car Cards ____ Posters ____ Timetables ____

Dioramas ___ Exhibits __ Islands ___ Other SPECTACULAR

Commencing JANUARY 1 1980 For FIVE YEARS

Size of Showing ONE Size of Display _____

Location PENNSYLVANIA STATION

Position OVER AMTRAK TICKET WINDOWS

Copy Changes AT ADVERTISERS EXPENSE

Service Changes ADVERTISER RESPONSIBLE FOR ALL CHARGES CONNECTED WITH INSTALLATION OF THE TRANSPARENCY AS WELL AS ELECTRICAL SERVICE AND CHARGES AS WELL.

REMARKS MAINTENANCE.

ADVERTISER RESERVES THE RIGHT TO CANCEL THIS CONTRACT UPON SIX (6) MONTHS PRIOR WRITTEN NOTICE. RIDER "A" ATTACHED HERETO IS PART OF THIS CONTRACT.

THIS CONTRACT CANCELS AND SUPERSEDES CONTRACT WRITTEN ON AUGUST 1, 1979.

THIS CONTRACT IS EXECUTED IN DUPLICATE BY THE UNDERSIGNED OR AGENCY AND ACCEPTED BY TDI SUBJECT TO CONDITIONS PRINTED ON THE REVERSE SIDE.

ACCEPTED 1/4 19 80

TRANSPORTATION DISPLAYS, INC

BY /s/ [illegible]

Sales Representative BOB NEUBERGER

Sales Office NEW YORK, NEW YORK

Address 275 MADISON AVENUE

ASH/LEDONNE ADVERTISING, INC
Advertiser or Agency

By /s/ [illegible]

Street 1500 BROADWAY

City NEW YORK, NEW YORK

Telephone Number 221-0140

Contract No _____

Initial Contract ___X___ Renewal ____

RIDER "A"

1. RATE

FIRST YEAR OF CONTRACT	$13,000 PER MONTH
SECOND YEAR OF CONTRACT	$13,500 PER MONTH
THIRD YEAR OF CONTRACT	$14,000 PER MONTH
FOURTH YEAR OF CONTRACT	$14,500 PER MONTH
FIFTH YEAR OF CONTRACT	$15,000 PER MONTH

2. RENEWAL

(a) ADVERTISER HAS THE OPTION TO RENEW THIS CONTRACT AT THE END OF THE INITIAL FIVE YEAR TERM SUBJECT TO PRIOR APPROVAL OF TDI AND AMTRAK.

(b) SPACE RATE AND OTHER CHARGES WILL BE SUBJECT TO NEGOTIATION.

(c) ADVERTISER MUST EXERCISE THIS OPTION, IN WRITING, NO LATER THAN 90 DAYS PRIOR TO EXPIRATION OF THE INITIAL TERM.

(d) THIS OPTION SHALL EXPIRE 45 DAYS PRIOR TO THE END OF THE INITIAL TERM.

3. ALL ADVERTISING COPY SHALL BE SUBJECT TO APPROVAL OF AMTRAK OR THE APPROPRIATE RAILROAD AUTHORITIES WHOSE DECISION SHALL BE FINAL BINDING.

THIS RIDER IS PART OF THE ADVERTISING CONTRACT WRITTEN BETWEEN ASH/LEDONNE ADVERTISING, INC., AND TRANSPORTATION DISPLAYS, INC., DATED, JANUARY 3, 1980.

/s/ [illegible]
ASH/LEDONNE ADVERTISING INC

/s/ [illegible]
TRANSPORTATION DISPLAYS, INC

[LETTERHEAD OF TDI]

TDI ADVERTISING CONTRACT DATE APRIL 22, 19

The undersigned hereby authorizes TRANSPORTATION DISPLAYS, INC. hereinafter referred to as TDI to display the following described advertising for which said Advertiser agrees to pay

the sum of FOURTEEN THOUSAND and 00/100
Net in advance during the term of the Contract:

Dollars ($ 14,000) Per MONTH

SUBJECT OF ADVERTISEMENT "SOPHISTICATED LADIES"

MEDIUM: Car Cards ____ Posters ____ Timetables ____ Dioramas ____ Exhibits ___ Island: ___ Showcase Kiosk ___ Other SPECTACULAR

Commencing May 15, 1982 For Twelve (12) Months

Size of Showing ONE Size of Display

Location Pennsylvania Station, New York

Position Over Amtrak ticket windows

Copy Changes At advertiser's expense.

Service Charges Advertiser is responsible for all charges connected with installation of the transparency as well as the electrical service and charges, as well as maintenance

YES xx NO

REMARKS SUBJECT TO 15% AGENCY COMMISSION
Rider "A" attached hereto is part of this contract

THIS CONTRACT IS EXECUTED IN DUPLICATE BY THE UNDERSIGNED OR AGENCY AND ACCEPTED BY TDI SUBJECT TO CONDITIONS PRINTED ON THE REVERSE SIDE.

ACCEPTED: _____ 19__

TRANSPORTATION DISPLAYS, INC.

BY /s/ [illegible]

Sales Representative BOB NEUBERGER

Sales Office New York

Address _____

Ash/Ledonne, Inc.
Advertiser or Agency

By /s/ [illegible]

Street 1500 BROADWAY

City NEW YORK, NEW YORK

Telephone Number 221-0140

Contract No _____

New Contract _____ Renewal _____

April 22, 1982

RIDER "A"

1) Advertiser has the option to renew this contract at the end of the initial twelve (12) month period subject to prior approval of TDI and Amtrak.

2) Space rate and other charges will be subject to negotiation.

3) All advertising copy shall be subject to approval of Amtrak or the appropriate railroad authorities whose decision shall be final and binding.

THIS RIDER IS PART OF THE ADVERTISING CONTRACT WRITTEN BETWEEN ASH/LEDONNE ADVERTISING, INC. AND TRANSPORTATION DISPLAYS, INC. DATED APRIL 22, 1982.

/s/ [illegible]
ASH/LEDONNE ADVERTISING, INC.

/s/ [illegible]
TRANSPORTATION DISPLAYS, INC.

[LETTERHEAD OF WINSTON NETWORK, INC.]

May 29, 1986

Mr. Bruce Bourque
Amtrak
400 North Capitol St. NW
Washington, DC 20001

Dear Bruce:

Enclosed is the black and white stat of the final approved photograph that will be used at the Penn Station Spectacular for Nike.

We estimate that this will be installed within three (3) weeks.

If you have any questions, please let me know.

Sincerely yours,

/s/ VINCENT NOTARO
Vincent Notaro
Senior Vice President

VN:DM

Enc.

[LETTERHEAD OF WINSTON NETWORK, INC.]

July 23, 1987

Mr. Bruce Bourque
National Railroad Passenger Corp.
400 North Capitol Street
Washington, DC 20001

Re: Penn Station Spectacular

Dear Bruce:

As discussed, recently the A & S department store has shown great interest in the leasing of this Spectacular sign at Penn Station.

The store will not open until the summer of 1988. They still have contracted with us for a twelve (12) month period starting on June 1, 1988. This contract is for $13,500 per month and is contingent upon them renewing for another twelve (12) months in 1989. If they choose not to renew for another year, they will have to pay an additional $500 per month short rate charge. They are also responsible for the $2,200 monthly electrical charge.

The two (2) other contracts enclosed are also contracts for A & S who wish to install a temporary sign earlier. Therefore, we have given them a special rate commencing October 1st and another commencing December 1st. This temporary sign will also be subject to your approval.

They are in the process of preparing the artwork for submission. As soon as I receive it, I will send it on for your approval.

If you have any questions, please do not hesitate to contact me.

Sincerely yours,

/s/ VINCENT NOTARO
Vincent Notaro
Senior Vice President

VN:DM

cc: Mike Leible
Jeanine Crescimanno

[LETTERHEAD OF TDI]

June 4, 1992

Mr. Bruce Bourque
Project Manager
NATIONAL RAILROAD PASSENGER CORP.
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002

Re: Penn Station Spectacular

Dear Bruce:

For your information, attached is a copy of the renewal contract for the A & S Spectacular. You will note that this contract is for a seven month period ending December 31, 1992, and that we have been successful in our effort to increase the monthly rate by 6%.

Although we would have preferred a twelve month renewal, given the current retail climate here in New York, we are happy to have a contract that will take us through the end of this year. We will, as always, take a very aggressive marketing stance regarding this property and are confident that our efforts will result in a long term commitment.

If you have any questions, please give me a call.

Sincerely,

/s/ RICHARD AMENT
Richard Ament
Vice President

cc: V. Notaro

CONTRACT FOR: RAIL ADVERTISING (CAR CARDS, POSTERS, TIMETABLES, DIORAMAS, EXHIBITS, ETC.)

☐ NEW ☒ RENEWAL

FROM Abraham & Strauss 420 Fulton Street Brooklyn, NY 11201	**CONTRACT NO.**	**DATE** April 31, 1992
	BRAND NAME/PRODUCT(s) A&S (06)	
	SALESPERSON NAME Lenny Garraffa	**NUMBER** 032
TO [LOGO OF TDI TRANSPORTATION DISPLAYS INCORPORTATED]	**SHIPPING ADDRESS** TDI 340 Railroad Avenue Ridgefield, NJ 07657 Attn: Fred Frohnapfel	**SHIPPING QUANTITY**

STATE AND MARKET	SIZE SHOWING	NO. OF DISPLAYS	TYPE OF DISPLAY	SIZE (HEIGHT & WIDTH)	STARTING DATE	NO. OF MONTHS	COST PER MONTH
New York Pennsylvania Station		(1)	"Penn Station Spectacular"	102'10"W x 10'3"H	June 1, 1992	(7)	$16, 690

SCHEDULE

YEAR

DATES ORDERED	JAN.	FEB.	MAR.	APR.	MAY	JUNE	JULY	AUG.	SEPT.	OCT.	NOV.	DEC.
1992						X	X	X	X	X	X	X

SPECIAL INSTRUCTIONS

Above rate is for space only. There is an additional $2,200 non-commissionable monthly electircal and maintenance charge. All contracts and copy are subject to final approaval by Amtrak.

THIS IS YOUR AUTHORITY TO DISPLAY AND MAINTAIN THE SHOWING SPECIFIED ABOVE IN ACCORDANCE WITH THE CONDITIONS ON THE REVERSE SIDE OF THIS CONTRACT.

ACCEPTED AND AGREED TO BY—TRANSPORTATION DISPLAYS INCORPORATED **ADVERTISER/AGENT**

BY _____ **DATE** _____ X /s/ [ILLEGIBLE]

CONTRACT FOR RAIL ADVERTISING **PLEASE PRINT** x MARTINE M. REARMAN—OVP MEDIA DIRECTOR

Name—Title

* * *

(6) No. 93-1525

Supreme Court, U.S.
FILED
JUL 25 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL A. LEBRON,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

R. BRUCE RICH
GLORIA C. PHARES
BERNADETTE M. MCCANN EZRING
JONATHAN BLOOM
SHARON B. APPLEGATE
MARC BROTMAN
JENNIFER S. TAUB
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

DAVID D. COLE
Counsel of Record
CENTER FOR CONSTITUTIONAL RIGHTS
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9078

Attorneys for Petitioner

1:30 PM

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that Amtrak's policy barring the display of political advertising in Pennsylvania Station, New York, was not federal action, where:

   a) the United States created Amtrak, endowed it with governmental powers, owns all its voting stock, and appoints all the members of its Board;

   b) the United States-appointed Board is responsible for and approved the advertising policy challenged here;

   c) the United States keeps Amtrak afloat every year by subsidizing its losses; and

   d) Pennsylvania Station was purchased for Amtrak by the United States and is shared with several other governmental entities.

2. Whether the court of appeals erred in holding that a higher degree of state involvement with a private entity must be shown to establish state action for First Amendment claims than for sex and race discrimination claims.

PARTIES TO THE PROCEEDINGS

Petitioner Michael A. Lebron was plaintiff-counter-defendant-appellee below. Respondent the National Railroad Passenger Corporation (Amtrak) was defendant-appellant below. Transportation Displays, Incorporated, a defendant in the proceedings before the district court, appears on the caption of the proceedings below as defendant-counter-claimant but did not participate in the proceedings before the court of appeals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1525

MICHAEL A. LEBRON,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 12 F.3d 388.[1] The opinion of the district court (Pet. App. 1b-22b) is reported at 811 F. Supp. 993.

[1] "Pet. App.," "J.A.," "C.A. App.," and "C.A. Exh." refer respectively to the following documents: the appendix to the Petition for a Writ of Certiorari; the Joint Appendix in this Court; the Joint Appendix in the court of appeals, and the exhibit volumes in the court of appeals. The plaintiff's and the defendants' exhibits were all offered and admitted in evidence by the district court on January 27, 1993. Tr. 8-10, 12, 13-15, 17-20.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1993. The petition for a writ of certiorari was filed on March 28, 1994, and granted on May 23, 1994. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent portions of the Rail Passenger Service Act, 45 U.S.C. § 501 *et seq.* (1988 and Supp. II 1990, Supp. IV 1992), and one provision of the Regional Rail Reorganization Act, 45 U.S.C. § 701 (1988), are set forth in an appendix to this brief.

STATEMENT

In 1992, petitioner Michael A. Lebron contracted with respondent National Railroad Passenger Corporation ("Amtrak"), the owner of Pennsylvania Station ("Penn Station"), to display an advertisement during January and February 1993 in a large advertising space at Penn Station known as the Spectacular. Pet. App. 2a, 2b. The work, a photomontage with text, executed in the style of an advertisement, makes the point that the profits generated by the Coors Brewing Company support various conservative causes. *Id.* at 4a-5a.[2] During negotiations for the advertising space, Lebron disclosed that his work was political, and was not told this would pose a problem. *Id.* at 3a-4a. Three days before the beginning of the contract period, however, Amtrak informed Lebron that it would not display his work because it violated Amtrak's policy against displaying "political" advertisements. *Id.* at 5a; 4b; J.A. 285. Amtrak has displayed other political advertisements in Penn Station, and at the time was displaying a four-sided, seven-foot advertising kiosk directly in front of the Spectacular for *The Plain Truth*, a conservative religious-political magazine expressing views on such issues as homosexuality, gambling, the Arab-Israeli conflict, and the European Union. Pet. App. at 19b-20b; J.A. 176-77 at ¶ 98; C.A. App. 204-35, 997-1002, 1144-75.

[2] Ten copies of the petitioner's photomontage—in reduced size—are being lodged with the Clerk of the Court.

Petitioner sued Amtrak and its agent, Transportation Displays, Incorporated ("TDI"), contending that Amtrak's policy and action violated the First Amendment. Pet. App. 1b-2b. The district court, per then-District Judge Pierre N. Leval, concluded that Amtrak was a government actor and that Amtrak's advertising policy violated the First and Fifth Amendments. *Id.* at 21b. A divided court of appeals reversed, ruling that Amtrak is not a government actor. *Id.* at 12a. Chief Judge Jon O. Newman dissented. *Id.* at 13a.

A. AMTRAK

The facts found by the district court, which were explicitly accepted by the court of appeals (Pet. App. 9a, 13a), establish that the United States created Amtrak, owns all of its voting stock, wholly controls membership of its Board of Directors, endows it with governmental powers, bankrolls it, and purchased and holds the mortgage on nearly all its property, including Penn Station.

1. *Congress's Creation of Amtrak*—The decades following World War II saw a rapid decline in the viability of the intercity passenger railroad train as the automobile and the airplane came to dominate the market for intercity travel. Donald M. Itzkoff, *Off the Track: The Decline of the Intercity Passenger Train in the United States* 5 (1985) ("Itzkoff"). "By the middle of this century . . . 'this time-honored vehicle' threatened to 'take its place in the transportation museum along with the stagecoach, sidewheeler, and the steam locomotive.' "[3]

[3] *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 453-54 (1985) (quoting Hosmer, Examiner, Report and Recommended Order, Railroad Passenger Train Deficit, ICC Docket No. 31054 at 69 (1958)).

When the Penn Central Transportation Company, the tenth largest corporation in the country and a major provider of passenger rail services, went bankrupt in 1970, Congress responded to the crisis in rail passenger service by enacting the Rail Passenger Service Act of 1970 ("RPSA"), which created Amtrak. Pub. L. No. 91-518, 84 Stat. 1327 (1970); Itzkoff at 79, 96; Mark B. Tobey, *Costs, Benefits, and the Future of Amtrak*, 16 Transp. L. J. 245, 253 (1987).

Congress initially envisioned that Amtrak would operate at a profit with substantial private investment.[4] Thus, it established Amtrak as a "for-profit" corporation under the District of Columbia Business Corporations Act, so long as those provisions did not conflict with the RPSA.[5] At the outset, Congress specified that Amtrak's Board would have 15 members: the Secretary of Transportation; seven members appointed by the President; three elected by the common shareholders; and four elected by the preferred shareholders, if any.[6] Thus, from the beginning, the federal government appointed the majority of Amtrak's Board. Congress classified Amtrak as a "mixed-ownership government corporation" (31 U.S.C. § 9101(2)(A)) subject to the Government Corporation Control Act, 31 U.S.C. § 9101 *et seq.*, which mandates federal fiscal oversight. RPSA, Pub. L. No. 91-518, § 804, 84 Stat. 1327, 1340 (1970).

Congress financed the establishment of Amtrak with a $40 million direct federal grant and $300 million in federal loan guarantees. J.A. 179 at ¶ 111; 45 U.S.C. § 501 *et seq.* It directed the Secretary of Transportation to designate a basic system of intercity passenger service that Amtrak would provide. 45 U.S.C. § 522. Under the Act, existing railroads could

[4] RPSA, Pub. L. No. 91-518, § 101, 84 Stat. 1327, 1328 (1970) (current version at 45 U.S.C. § 501); H.R. Rep. No. 1580, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4735, 4735.

[5] RPSA, Pub. L. No. 91-518, § 301, 84 Stat. 1327, 1330 (1970) (current version at 45 U.S.C. § 541).

[6] RPSA, Pub. L. No. 91-518, § 303, 84 Stat. 1327, 1330-31 (1970) (current version at 45 U.S.C. § 543).

be relieved of their responsibility to provide service by contracting with Amtrak to assume their services. 45 U.S.C. §§ 561(1) and (2). All but a few railroads elected to do so. J.A. 590, Stip. D. As a result, Amtrak assumed nearly all intercity passenger service obligations.[7]

In 1973, when seven bankrupt railroads in the northeast and midwest could not agree on a reorganization plan, Congress took further action, enacting the Regional Rail Reorganization Act, 45 U.S.C. § 701 *et seq.* ("RRRA"). 45 U.S.C. § 701(a)(1) and (2). In so doing, Congress specifically found that the

> public convenience and necessity require adequate and efficient rail service in this region and throughout the Nation to meet the needs of commerce, the national defense, the environment, and the service requirements of passengers, United States mail, shippers, States and their political subdivisions and consumers.

45 U.S.C. § 701(a)(3). The RRRA directed "the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region." 45 U.S.C. § 701(b)(2), (3), and (4).

To this end, Congress instructed the Secretary of Transportation and the United States Railway Association, which consisted almost entirely of federal officials, to create and adopt a Final System Plan. 45 U.S.C. §§ 716-17. The Final System Plan, a comprehensive document of more than 400 pages, approved by Congress in 1975, set forth an elaborate scheme under which the Consolidated Rail Corporation ("Conrail") and Amtrak would become, respectively, the dominant freight and intercity passenger carriers. The Plan specified how the Northeast Corridor would be acquired and financed (recognizing that passenger fares would not cover costs); outlined a Northeast Corridor improvement program;

[7] Amtrak eventually absorbed all privately operated intercity passenger train service, and since 1983 Amtrak has been the sole provider of such service. *See* Don Phillips, *Railroads' Attempt to Track New Future for Dying Trains*, Travel Weekly 236 (May 31, 1983).

and detailed how the Northeast Corridor should be operated. J.A. 443-67; C.A. App. 519-957.

In 1976, Congress conveyed the Northeast Corridor properties first to Conrail and then to Amtrak pursuant to the Final System Plan and the Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. No. 94-210, 90 Stat. 31 (1976)). J.A. 185-86 at ¶¶ 139-40; C.A. Exh. 958-66. The United States eventually "paid Penn Central $2.113 billion as compensation for the Northeast Corridor properties, including Penn Station," the largest settlement payment in United States history. Pet. App. 9b n.7; J.A. 188-89 at ¶¶ 154-57 (and authority cited there).

2. *Congress's Restructuring of Amtrak*—From the beginning, Amtrak operated at a loss, and required massive annual federal subsidies. H.R. Rep. No. 1182, 95th Cong., 2d Sess. 7-9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2313, 2314-17. By 1978, Congress recognized that its 1970 hope that Amtrak would become a profit-making entity with considerable private investment would not be realized. Amtrak's operations had not attracted the number of rail passengers needed to make the railroad a profitable operation, and few of the bankrupt railroads had elected to invest in Amtrak by taking its shares as part of the settlement of their bankruptcies. H.R. Rep. No. 1182, 95th Cong., 2d Sess. 7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2313, 2314.[8] In a candid attempt to "conform the law to reality," Congress replaced the original language of 45 U.S.C. § 541—"Amtrak shall be a for-profit corporation"—with the more accurate "Amtrak shall be operated and managed as a for-profit corporation." H.R. Rep. No. 1182, 95th Cong., 2d Sess. 15 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2313, 2323 ("This amendment recognizes that Amtrak is not a for-profit corporation").

In 1981, Congress went even further and revamped Amtrak's corporate structure to ensure total federal control of

[8] Indeed, the number of issued common shares of Amtrak has never increased. J.A. 387, 418.

Amtrak and to eliminate any private, non-governmental input into Amtrak's governance. Congress reduced the size of Amtrak's Board from fifteen to nine and omitted all directors elected by the common shareholders, the private railroad companies.[9] From that point on, Amtrak's Board consisted solely of federal appointees.

In addition, in order to protect the government's substantial and continuing financial support of Amtrak, Congress required Amtrak's Board to issue to the United States preferred shares in amounts that equaled all funds Congress had by then appropriated for Amtrak and to issue preferred shares equal to Congress's appropriations in the future.[10] For the same reasons, Congress directed that no stock or debt instrument with a liquidation interest superior to the preferred stock (all owned by the United States) or secured by Amtrak's property (all pledged to the United States) could be issued without the consent of the Secretary of Transportation.[11]

3. *Amtrak's Formal Corporate Structure*—Today, Amtrak's corporate structure and governance ensure that the United States retains control of the corporation. 45 U.S.C. § 501 *et seq.*

The United States appoints, directly or indirectly, all of Amtrak's directors. 45 U.S.C. § 543(a); Pet. App. 7b. The President directly appoints five of the Board's nine members, three with the advice and consent of the Senate. 45 U.S.C.

[9] 45 U.S.C. § 543; Amtrak Improvement Act of 1981, Pub. L. No. 97-35, 95 Stat. 687, 689-691 (1981).

[10] 45 U.S.C. § 544(c); S. Rep. No. 139, 97th Cong., 1st Sess. 318 (1981), *reprinted in* 1981 U.S.C.C.A.N. 396, 606. When the number of preferred shares Amtrak was required to issue to the United States was about to exceed the number of preferred shares then authorized by Amtrak's articles of incorporation, Congress amended Amtrak's statute to provide that the issuance of such shares would not require an amendment of Amtrak's articles of incorporation. 45 U.S.C. § 544(c)(4); J.A. 293, 389-90.

[11] 45 U.S.C. § 544(d); S. Rep. No. 139, 97th Cong., 1st Sess. 318 (1981), *reprinted in* 1981 U.S.C.C.A.N. 396, 606.

§ 543(a)(1)(C) and (D)(ii). The Secretary of Transportation sits *ex officio*. 45 U.S.C. § 543(a)(1)(A). Because the United States Government owns all of Amtrak's preferred stock, the Secretary of Transportation, who holds the stock, selects two members. 45 U.S.C. §§ 543(a)(1)(E), 544(c). The ninth Board member is Amtrak's president, who is selected by the other eight Board members. 45 U.S.C. § 543(a)(1)(B) and (d).

The United States owns all of Amtrak's preferred and *only voting* stock; the common shareholders (the four private railroad companies) have no right to vote for a member of the Board.[12] Moreover, the common stock has virtually no value. As of 1992, the United States owned 77,539,095 preferred shares, each with $100 par value, as compared to 9,385,694 common shares, each with $10 par value. J.A. 390-91 at note 3. Congress has directed that dividends of at least six percent per year, which are cumulative, must be paid on the preferred shares before any dividend is ever paid on the common shares. 45 U.S.C. § 544(a)(A), (B)(i), (B)(ii). The preferred shares also have a liquidation preference over the common shares. 45 U.S.C. § 544(a)(B)(ii). And in the event of a liquidation, Amtrak's obligations would far outweigh its assets. C.A. Exh. 1342; PX 61 at 18-28. Thus, the common shares are for all practical purposes worthless.

Congress has stated that Amtrak is "not . . . an agency, instrumentality, authority, or entity, or establishment of the United States Government" (45 U.S.C. § 541), but it treats Amtrak as a public entity in many respects. Amtrak is subject to the Freedom of Information Act[13] and the Government in the Sunshine Act,[14] laws to which no other private entities are subject. In the Americans with Disabilities Act, Congress designated Amtrak as a "public entity," along with state and local

12 45 U.S.C. §§ 543(a)(1) and (2); Pet. App. 7b; J.A. 181 at ¶¶ 117-18; 390-91 at Note 3; 592.

13 45 U.S.C. § 546(g); 49 C.F.R. Part 700 (1993).

14 5 U.S.C. §§ 552(e), 552b; H.R. Conf. Rep. No. 1441, 94th Cong., 2d Sess. 10-11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2244, 2246.

governments and agencies.[15] The Inspector General Act of 1978 identifies Amtrak as a "designated Federal entity," and requires it to maintain an Office of the Inspector General. 5 U.S.C. app. 2 § 8G (Supp. V 1993). No private entities are subject to the Inspector General Act. Finally, Congress made Amtrak's chief executive officer a member of the Tourism Policy Council, an "interagency coordinating council" composed of government entities and officials.[16]

"Amtrak has also been vested with various attributes of governmental character." Pet. App. 8b-9b. It has the power of eminent domain (45 U.S.C. § 545(d); Pet. App. 8b; J.A. 182 at ¶ 123), a traditional sovereign power vested in no private entities. It must submit three different reports annually on its operations and finances to Congress (45 U.S.C. § 548; Pet. App. 9b; J.A. 183-84 at ¶ 133); its financial transactions are monitored by an Inspector General and may be audited by the Comptroller General (31 U.S.C. §§ 9105-9106; 45 U.S.C. § 644(2); J.A. 183 at ¶ 132); and, for the first 22 years of its existence, it could borrow under the credit of the federal government (45 U.S.C. § 602, *repealed by* the Amtrak Authorization and Development Act, Pub. L. No. 102-533, § 7(c), 106 Stat. 3515, 3519 (1992); Pet. App. 8b-9b).[17]

15 42 U.S.C. § 12131(1); Pet. App. 7b & n.3.

16 22 U.S.C. § 2124a(a), (b)(1)(M), (d)(1). The other Council members are the Secretary of Commerce, the Under Secretary for Travel and Tourism, the Director of the OMB, a representative of the International Trade Administration chosen by the Secretary of Commerce, the Secretary of Energy, the Secretary of State, the Secretary of the Interior, the Secretary of Agriculture, the Chairman of the Tennessee Valley Authority, the Commanding General of the Army Corps of Engineers, the Administrator of the Small Business Administration, the Commissioner of the Immigration and Naturalization Service, the Commissioner of Customs, the Secretary of Labor, and the Secretary of Transportation. *Id.*

17 In 1976, Amtrak's fiscal year-end for accounting purposes was changed from December 31 to September 30 "to coincide with the fiscal year adopted by the federal government and used in providing federal assistance to [Amtrak]." Pet. App. 8b n.5; Amtrak Improvement Act of

Amtrak is authorized to employ its own police force. 45 U.S.C. § 545(j). The Amtrak police at Penn Station, appointed as police officers by the State of New York, have the right to make arrests on Amtrak property when "provid[ing] security and protection for rail passengers. . . and for rail properties." *Id.*; N.Y.R.R. Law § 88 (McKinney 1991); J.A. 58-60.

Like federal agencies and unlike private corporations, Amtrak is exempt from the burden of paying taxes or other fees (including all real estate taxes) imposed by any state or local authority. As a result, Amtrak is relieved of the burden of paying the annual New York real estate tax on Penn Station of nearly $18 million. 45 U.S.C. §§ 546(n), 546b; J.A. 353-67.

4. *Congress's Financial Interrelationship with Amtrak*—The federal government is "deeply involved in the financing of Amtrak's operations" and the acquisition and maintenance of its assets. Pet. App. 7b-8b. As noted earlier (*see supra* p. 6), the United States provided over $2 billion for the purchase of Amtrak's Northeast Corridor properties, including Penn Station. The federal government holds a mortgage valued at "hundreds of millions of dollars" on those properties, which secures a note that does not mature for nearly 1000 years (the year 2975).[18]

In addition, in every one of its 24 years of existence, Amtrak has depended on substantial federal subsidies to cover its losses.[19] Between 1988 and 1992 alone, Congress appropriated $3.312 billion to subsidize Amtrak's operating losses. 45 U.S.C. § 601; Pet. App. 7b-8b; J.A. 190 at ¶ 166. And Congress has invested billions of dollars in maintenance,

1975, Pub. L. No. 94-25, 89 Stat. 90, 90 (1975); H.R. Rep. No. 119, 94th Cong., 1st Sess. 7 (1975), *reprinted in* 1970 U.S.C.C.A.N. 165, 169; J.A. 190 at ¶ 162; 409.

[18] Pet. App. 9b; J.A. 57, 194 at ¶ 187, 390 at Note 2, 414. Neither that note nor another, secured by Amtrak's rolling stock, bears interest unless prepaid, which according to its 1992 Annual Report, "Amtrak does not intend to do." J.A. 390 at Note 2.

[19] Pet. App. 7b-8b; J.A. 46-47, 50, 189 at ¶ 161, 191-92 at ¶ 175; C.A. Exh. 1320.

rehabilitation, and development of the Northeast Corridor.[20] The United States retains control over Amtrak's properties because they cannot be sold or leased without approval of the federally-appointed Board (J.A. 25, 468-70), and cannot be disposed of or downgraded without approval of the Secretary of Transportation (45 U.S.C. § 566(a)).

Because of Amtrak's dependence on federal subsidies, a dollar of revenue earned by Amtrak is a dollar saved by the United States. Pet. App. 8b. In recognition of this direct fiscal relation, Congress has specifically encouraged Amtrak to enter into profit-generating contracts with the private sector in order to reduce the level of federal subsidies. 45 U.S.C. § 501a(1), (14); Pet. App. 8b n.5. One of Amtrak's revenue-generating enterprises consists of leasing advertising space in its stations and along its right of way. Thus, as the district court found, "Amtrak's revenues from the leasing of its billboard space are, in a sense, revenue of the federal government." Pet. App. 8b.

5. *Amtrak's Interrelations With Other Public Authorities*—Amtrak's governmental relationships are not limited to the United States. Penn Station, one of the busiest hubs in New York City, also serves as a station for New Jersey Transit ("NJT") and the Long Island Railroad ("LIRR"), both public authorities.[21] The New York subway system, operated by the New York City Transit Authority ("NYCTA"), another public authority, abuts the station at both ends.[22]

As the district court found,

> An array of leases and joint agreements among Amtrak, LIRR, and NJT govern the management of the public

[20] *See* 45 U.S.C. § 854; Pet. App. 9b; J.A. 191 at ¶¶ 170-71; C.A. Exh. 1342.

[21] N.J. Stat. Ann. § 27:25-4 (West 1994); N.Y. Pub. Auth. Law § 1263 (McKinney 1982 & Supp. 1993); N.Y. Transp. Law § 219-c (McKinney 1982 & Supp. 1993); Pet. App. 9b n.8.

[22] N.Y. Pub. Auth. Law §§ 1201, 1263 (McKinney 1982 & Supp. 1993); J.A. 19-20, 154-55 at ¶¶ 7-8.

> areas of Penn Station, the passage of passengers through the station and from one transportation facility to another, and the funding of construction and maintenance of various train and tunnel facilities.

Pet. App. 9b n.8.[23] Some LIRR and NJT facilities, such as ticket and information booths, are located in the midst of Amtrak's facilities on the same floor as the Spectacular. *Id.* An NYCTA official shares space in Amtrak's information booth on that floor (J.A. 88, 195 at ¶ 196), and easements with NYCTA permit subway passengers to use Penn Station as a transfer point (*id.* at 19-21). Although constitutional restrictions indisputably apply to the LIRR, NJT, and NYCTA, the public has no way of knowing whether any particular area of Penn Station is governed by Amtrak or one of the other governmental transportation authorities. Pet. App. 9b n.8.

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6. *Amtrak's Board and Advertising in Penn Station*—The federal government's involvement with Amtrak extends to the particular advertising policy challenged in this case, by virtue of its control of Amtrak's Board and the Board's responsibility for that policy. J.A. 166-68 at ¶¶ 59-63. Amtrak's federally-appointed Board has direct authority over Amtrak's advertising policies. J.A. 24-25, 166 at ¶ 59. The Board has delegated authority to implement that policy, subject to Board review, to Anthony DeAngelo, the Vice President for Real Estate and Operations Development. Pet. App. 4b; J.A. 24-25, 30-31, 166 at ¶ 59; C.A. App. 739-40.

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[23] For example, Amtrak, the Metropolitan Transit Authority (which owns and operates the LIRR), and the LIRR have entered into an agreement under which Amtrak and the LIRR will jointly design, construct, operate, and maintain a modern system for the central control of train movements in and around Penn Station and the East River tunnels. J.A. 197 at ¶ 201; C.A. Exh. 1589, 1678-1768, 1922-2019, 2074-76, 2078-79. Amtrak has also entered into a "Northeast Corridor Services Agreement" with New Jersey Transit to improve service and equipment in the Northeast Corridor. J.A. 197 at ¶ 203; C.A. Exh. 1104-1143. Through these and other agreements, Amtrak's operations at Penn Station are inextricably intertwined with the operations of these governmental entities.

Amtrak's Board has consistently and closely supervised the arrangements by which advertising space, including the Spectacular, is leased in Penn Station. Amtrak's Board is required to authorize all new contracts regarding the leasing of advertising. J.A. 42. The record shows that the Board authorized an agency contract to lease advertising space in 1991, and also authorized an individual contract for the Spectacular in 1987.[24] J.A. 200, 368-73, 401-02.

The advertising policy at issue here preceded DeAngelo's arrival at Amtrak in 1982 (J.A. 17, 29-30, 34) and is reflected in writing in Amtrak's leasing contracts (*id.* at 25, 28-29, 200, 204 at § 6, 221, 227 at § 6, 244, 261 at ¶ 27, 318, 325-26 at ¶¶ 17-18). DeAngelo testified that the policy applied to all advertising on Amtrak property, and required that advertising material be "noncompetitive with our business interest, . . . not pornographic, and not objectionable to our riding public and others associated with us including political and other types of potentially controversial matters." J.A. 27-28. He defined "objectionable to the riding public" as

> [i]ssues that would cause our passengers to be concerned and upset to write letters to us, to talk about it amongst themselves and things which they would find inappropriate for Amtrak to be part of

(J.A. 37). The ban on political advertising does not extend to all noncommercial advertising, and several noncommercial advertisements have been displayed at Penn Station in addition to the longstanding *Plain Truth* advertisement described above. Pet. App. 19b-20b; J.A. 176-77 at ¶¶ 94-98; *see supra* pp. 2-3.

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[24] The approvals involved several layers of review. For example, in 1987, in connection with the first of several A&S Department Store, Inc. contracts for the Spectacular, the Chair of the Board's Real Estate Subcommittee, also a Board member, first "reviewed the terms and conditions of the lease" and then "following discussion," the Subcommittee recommended a resolution that "the Corporation is authorized to enter into a lease with A&S. . . ." J.A. 368-69. The same day, the Finance Subcommittee also recommended the resolution (*id.* at 370-71), and the next day, after a Board member advised the Board of the financial terms of the lease, the Board approved the resolution (*id.* at 372-73).

The leasing contracts to which DeAngelo pointed as reflecting Amtrak's advertising policy date from 1967, 1980, 1985, and 1991. J.A. 40-43, 200, 221, 244, 318. In the 1980 contract, Amtrak reserved the right to disapprove advertising that in its sole judgment

> may be unlawful, immoral, improper or offensive to good taste, or be in competition directly or indirectly with the transportation conducted by [Amtrak]; or involve political or other views which could result in dissension or involve [Amtrak] in dissension, complaints or controversy with its patrons or the public or involve matters or ramifications not anticipated or foreseeable.

J.A. 261-62 at ¶ 27. In the 1985 and 1991 contracts, Amtrak reserved the right to disapprove "advertising material (including advertising content) which may be considered objectionable by Amtrak." J.A. 227 at § 6; 204 at § 6.

B. PROCEEDINGS BELOW

1. After an expedited trial based on written submissions largely stipulated by Amtrak (Pet. App. 2b; J.A. 153-199 at ¶¶ 1-209), District Judge Leval made extensive findings regarding Amtrak's dependence upon and control by the United States. Carefully considering all these facts, he concluded that the "federal government's deep and controlling entwinement in Amtrak's structure and operations" justified treating Amtrak's policy regarding speech access to Penn Station billboards as government action. Pet. App. 6b.

In reaching this result, Judge Leval rejected respondent's reliance on a number of cases that had held that Amtrak (or Conrail) is not a federal actor for routine employee decisions. Pet. App. 10b-11b. Noting that "[w]hether conduct of a particular entity will be deemed governmental action can vary with the type of action at issue" (*id.* at 11b), the district court held that permitting Amtrak to deal with routine employee matters under the same rules that govern private employers

did not implicate the same profound constitutional consequences as would permitting Amtrak to allocate access to government-purchased properties to speakers on political grounds (*id.* at 11b-12b). Endowed with the status of a private actor, Amtrak "would be free to exercise discriminatory control over the messages transmitted by its billboards" (*id.* at 12b) and could " 'effectively drive certain ideas or viewpoints from the marketplace' " (*id.* at 13b (quoting *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991))).

The district court concluded that it was "inconceivable" that Amtrak should have such freedom to control ideas when "[its] directors are appointed by the President, [its] operations are financed by the Government, and [it] is subject to Governmental control and intertwinement in all the respects outlined above." Pet. App. 13b. Amtrak, it held, "must be deemed to engage in governmental action when it undertakes to regulate the content of the advertisements on its billboards." *Id.* at 14b.

The district court then held that Amtrak's policy for regulating advertising on its billboards violates the First Amendment because (1) it is not clearly set forth; (2) its vagueness permits abuse; (3) it is not consistently applied; and (4) it may discriminate on the basis of viewpoint. Pet. App. 14b-21b. Accordingly, the district court directed Amtrak to give petitioner "immediate access to the Spectacular in accordance with his contract" (*id.* at 22b). That order was later stayed by a panel of the court of appeals.

2. A divided court of appeals reversed, holding that "Amtrak is not a governmental actor subject to the strictures of the First Amendment." Pet. App. 3a. The panel majority did not "take issue" with the district court's detailed findings regarding the interrelationship between Amtrak and the federal government, but "rather with the legal conclusion that is derived from it." Pet. App. 9a.

The panel relied on three factors in concluding that Amtrak is not a government actor for purposes of regulating speech access to Penn Station. First, it concluded that Amtrak is a private entity because Congress stated that it is "not an agency" of the United States. Pet. App. 7a. Second, it noted that several prior courts had found Amtrak or Conrail not to be federal actors for purposes of routine employee decisions. Pet. App. 9a, 11a-12a. It rejected Judge Leval's view that these cases were distinguishable because they did not address conduct with broad public consequences for speech by noting that one employee case, *Myron v. Consolidated Rail Corporation*, 752 F.2d 50 (2d Cir. 1985), included a First Amendment claim. Pet. App. 9a-10a. The panel majority made no attempt to compare the facts of government involvement in the earlier cases with the facts here, nor to assess whether Amtrak's objective characteristics made it a government entity.

Third, the panel majority held that Lebron had to meet a heightened showing of state involvement to demonstrate state action, because "a less stringent standard for finding state action should be applied when racial or sexual discrimination is at issue . . . than when there is a claim of a First Amendment violation." Pet. App. 10a-11a.

While the district court found that *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and its progeny compelled a finding that Amtrak and the federal government had a "symbiotic relationship" (Pet. App. 5b-6b), the panel majority made no attempt to distinguish *Burton*, and instead simply stated in a footnote that "[s]ome commentators have suggested" that its authority has been "curtailed" (*id.* at 8a n.1).

Because it found no government action, the panel majority did not address the district court's conclusion that Amtrak's policy violated the First Amendment, and that issue is not presented here.

Chief Judge Newman dissented. Pet. App. 13a. Agreeing with Judge Leval, he concluded that the "extensive involvement of the Government in the structure and financing of Amtrak" qualifies Amtrak as a "governmental actor, subject to First Amendment limitations, when it undertakes to regulate the political content of advertisements on billboards." *Id.* at 14a.

On the merits of petitioner's First Amendment claim, Judge Newman concluded that "Amtrak's advertising policy may well run afoul of First Amendment limitations," but that while damages or declaratory relief would be appropriate, an injunction requiring display of the advertisement would not. Pet. App. 15a-16a.

SUMMARY OF ARGUMENT

Had the Long Island Railroad barred Michael Lebron's advertisement from its area of Penn Station on the basis of a policy against "objectionable" political advertising, the First Amendment would indisputably apply.[25] Amtrak is in every relevant respect as much a governmental entity as the Long Island Railroad, and therefore its policies and conduct must similarly be subject to constitutional restraint.

1. In most state action cases, the Court must determine whether the conduct of a private entity should be treated as state action because of government involvement with that entity. Here, by contrast, the entity that acted—Amtrak—is itself a governmental entity. Where, as here, the government appoints an entity's board or is otherwise "entwined in the management or control" of the enterprise, the entity is a government actor for constitutional purposes. *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957); *Evans v. Newton*, 382 U.S. 296 (1966).

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[25] *International Soc. for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992) (publicly owned airport governed by First Amendment); *Penthouse Int'l v. Koch*, 599 F. Supp. 1338 (S.D.N.Y. 1984) (New York subways governed by First Amendment); *Kissinger v. New York City Transit Auth.*, 274 F. Supp. 438 (S.D.N.Y. 1967) (same).

Although Congress initially created Amtrak with the hope that it might someday become a profitable and independent private enterprise, the reality is that Amtrak is now for all practical purposes a government agency. Acknowledging this reality, Congress amended Amtrak's structure in 1981 to ensure that the United States maintains full control of the corporation, both by virtue of owning all of its voting stock and by wholly appointing its Board. Just as it does with the Department of Transportation, the United States appoints Amtrak's head policy-makers, determines its structure and goals, and allocates the necessary tax dollars to keep it running. Just as the Department of Transportation's policies are subject to constitutional review, so too should Amtrak's be.

2. Even if the Court does not treat Amtrak as a governmental entity for all purposes, it is a governmental actor for purposes of the specific conduct challenged here because Amtrak enjoys a "symbiotic relationship" with the federal government and several state and local governments at Penn Station. A "symbiotic relationship" exists where government, by virtue of fiscal interdependence, authority to control, and sharing of space, can be characterized as a "joint participant" with a private entity. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). That test is easily satisfied here.

The United States could not be more fiscally interdependent with Amtrak. Because Congress covers Amtrak's losses every year, a dollar earned by Amtrak is a dollar saved by the United States. That fiscal interest extends to the specific conduct challenged, because both Amtrak's policy barring "objectionable" political advertising and its application to Lebron were driven by concerns about offending potential passengers and thereby losing revenue.

The United States has unlimited authority to control Amtrak. Congress created Amtrak by statute, and has revised Amtrak's policies, duties, and structure whenever it has deemed fit. Amtrak's Board is itself a governmental body, and

is directly responsible for the policy Lebron challenges, which it has approved.

Finally, Amtrak's physical interrelations with government at Penn Station are inextricably intertwined. Penn Station itself was purchased by the federal government, transferred to Amtrak, and is secured by an interest-free note that does not mature for 1000 years. And Amtrak shares Penn Station with three different governmental entities—New Jersey Transit, the New York City Transit Authority, and the Long Island Railroad. To the millions of public commuters who pass through Penn Station every year, it is virtually impossible to tell where Amtrak ends and one of many government entities begins.

3. Even absent its "symbiotic relationship," Amtrak's conduct in this case would constitute federal action because Lebron challenges an official corporate policy for which the federally appointed Board is directly responsible. The Board's policy "compelled" and "encouraged" the rejection of Lebron's advertisement, and is subject to constitutional review. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 546 (1987).

To hold that Amtrak is *not* a government actor would mean that an entity not only dependent upon but wholly controlled by the government would have a constitutional right to allocate billions of dollars of government-purchased properties to support speech on one side of any controversial political issue. Not only would Lebron and others have no constitutional claim where Amtrak suppressed their speech, but Amtrak would have a constitutional claim if Congress attempted to restrain its politically biased practices.

4. Finally, the court of appeals held, contrary to the explicit or implicit holdings of eleven other Circuits, that a higher state action threshold applies for First Amendment claims than Equal Protection claims. The state action inquiry is designed to determine when an entity should be subjected to constitutional constraints, and that determination does not turn on a necessarily subjective ranking of constitutional pro-

visions. Moreover, even if such a ranking were appropriate, there is no basis for treating First Amendment claims less favorably than Equal Protection claims.

ARGUMENT

I. AMTRAK IS A GOVERNMENTAL ENTITY FOR CONSTITUTIONAL PURPOSES BECAUSE THE UNITED STATES OWNS AND CONTROLS IT

The Constitution constrains governmental action "by whatever instruments or in whatever modes that action may be taken." *Ex parte Virginia*, 100 U.S. 339, 346-47 (1879). Government operates in many forms: through the legislative, executive, and judicial branches; through officials, employees, and agents; and increasingly through government corporations such as Amtrak. Because the United States owns and controls Amtrak, Amtrak should be subject to the same constitutional limits as a government agency.

A. Entities Controlled by Government Are Subject to Constitutional Constraints

"In the typical case raising a state action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action." *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988). In this case, by contrast, the issue is whether the entity charged with the decisive conduct—Amtrak—is itself a governmental entity for constitutional purposes. Petitioner contends that it is, because it is owned and controlled by the United States.

While Congress initially created Amtrak with the hope that it would become an independent, profitable enterprise, that hope was soon dashed, as Amtrak required massive government subsidies every year to keep afloat. In 1978, Congress acknowledged by statute that Amtrak was *not* a "for-profit

corporation." And in 1981, Congress abandoned the notion of private participation in Amtrak by eliminating from the Board any directors elected by the common shareholders and ordering issuance to the United States of preferred shares equal to the government's investment. "The net result of this statutory change was to make Amtrak a wholly owned Federal Government corporation in fact if not in name." Cong. Res. Serv. Rep. No. 83-236 GOV, *Administering Public Functions at the Margin of Government: The Case of Federal Corporations* 193 (1983).[26]

Today, the United States owns all of Amtrak's voting stock. It appoints eight members of Amtrak's Board, and the ninth is chosen by the other eight. And the Board of federal appointees in turn manages "the property, affairs and business of the Corporation." J.A. 635 at § 4.01; D.C. Code Ann. § 29-332 (1981).

In addition to being controlled and owned by the government, Amtrak acts like a government agency. It exercises powers "traditionally associated with sovereignty, such as eminent domain." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974). It is subject to numerous federal laws to which private entities are not. And like other federal entities, it is exempt from many state and local laws. It operates on property—including Penn Station—that the United States purchased for it.[27] And for every year of Amtrak's 24-year existence, the United States has appropriated hundreds of millions of dollars, without which Amtrak would have ceased to exist. By all objective criteria, Amtrak is a governmental

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[26] The only "private" feature of Amtrak that remains are the four private railroads' common shares in Amtrak. These shares, however, are nothing more than vestigial remnants of Congress's early hope that Amtrak might be privatized. As noted above, they are practically worthless, and, because they are nonvoting, they entail no ability to control the corporation. *See* Statement of Facts, *supra* at p. 8.

[27] The fact that the United States was willing to transfer property worth hundreds of millions of dollars to Amtrak, backed by an interest-free note that does not mature for 1000 years, only underscores Amtrak's governmental character; it is exceedingly unlikely that the United States would be so generous to a private entity over which it had no control.

entity: it owes its creation and continued existence to the United States, and the United States owns and controls it.

Had the Eagle Coffee Shoppe in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, been owned by the State, run by a Board appointed by the Governor, and kept afloat through annual state subsidies, there would have been no dispute that its racially discriminatory access policy was state action. Had the private school in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), been owned by the government, run by a government-appointed School Board, and operated on government-purchased property, the school's discharge of schoolteachers for their speech would surely have been subject to a First Amendment challenge. And had the electrical utility in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), or the nursing home in *Blum v. Yaretsky*, 457 U.S. 991 (1982), been owned by the state and run by state-appointed boards, can there be any doubt that the Court would have found state action? What made each of these cases difficult was the fact that the entities directly acting were indisputably private. That is just not so here.

The most analogous state action case that this Court has decided is *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957). In that case, the Court unanimously held that Girard College, which was built, maintained, and operated with private funds, was nonetheless a state actor for constitutional purposes because it was run by a state-appointed Board, the "Board of Directors of City Trusts of the City of Philadelphia." *Id.* at 231. In *Evans v. Newton*, 382 U.S. 296 (1966), the Court extended that principle to a privately owned park that had been administered by the city, but had subsequently been transferred to the management of private trustees. The Court held that as long as "the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment." *Id.* at 301.[28]

[28] While the dissenters in *Evans* disagreed about whether *as a factual matter* the municipality retained management or control responsibilities, 382 U.S. at 312-22 (dissenting opinions of Black, J., and Harlan, J.), no one disputed the legal principle that if the municipality did have that responsibility, the park would be subject to the Constitution.

The case for treating Amtrak as a government actor is much stronger than either of these cases. Like Girard College, Amtrak is run by a governmentally-appointed Board; in addition, Amtrak was built, maintained and operated with *public* funds, and is owned by the government and endowed with governmental powers. The United States is, in short, fully "entwined in the management or control" of Amtrak.

As early as 1946, this Court unanimously held that a corporation should be treated as a governmental entity where it manifests governmental characteristics. *Cherry Cotton Mills v. United States*, 327 U.S. 536 (1946). In language equally applicable to Amtrak, the Court stated:

> [the Reconstruction Finance Corporation's] Directors are appointed by the President and confirmed by the Senate; its activities are all aimed at accomplishing a public purpose; all of its money comes from the Government; its profits, if any, go to the Government; its losses the Government must bear. *That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes.*

327 U.S. at 539 (emphasis added). Similarly, here, the fact that Congress chose to call Amtrak a corporation "does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes."

Other corporations over which the government exercises control through appointment of the board and partial or complete ownership have been treated as government actors for constitutional purposes. For example, the Federal Deposit Insurance Corporation ("FDIC") and the Resolution Trust Corporation ("RTC"), both "mixed-ownership government cor-

porations" like Amtrak, 31 U.S.C. § 9101(2)(C),(L), have been subjected to constitutional claims.[29] Similarly, the Tennessee Valley Authority, which like Amtrak is run by a federally appointed board but was created to operate as a business enterprise and generates substantial revenues from the private marketplace, has been treated as a government actor.[30]

Governments increasingly employ the corporate form at both the federal and state level to perform a wide variety of

[29] *FDIC v. Meyer*, 114 S. Ct. 996 (1994) (holding that due process challenge to FDIC's termination of bank officer does not support *Bivens* action, but not questioning applicability of Constitution); *FDIC v. Mallen*, 486 U.S. 230, 248 (1988) (applying due process analysis to FDIC's use of a statutory postsuspension procedure for discharging indicted bank official); *Nimon v. Resolution Trust Corp.*, 975 F.2d 240, 247-48 (5th Cir. 1992) (due process challenge to RTC's procedures for resolving insurance coverage dispute); *Gross v. Bell Savings Bank*, 974 F.2d 403, 405 (3d Cir. 1992) (due process challenge to RTC's withholding of savings and loan association's pension funds); *California Housing Sec., Inc. v. United States*, 959 F.2d 955, 957 (Fed. Cir.), *cert. denied*, 113 S. Ct. 324 (1992) (takings claim against RTC).

The FDIC and RTC boards are appointed by the President, 12 U.S.C. §§ 1812, 1441a(a)(3), and both receive federal funding, 12 U.S.C. §§ 1821(a)(6)(D)(J), 1824, 1441a(i)(1)(A). Unlike Amtrak, however, they are largely self-sufficient. Francis J. Leazes, *Accountability and the Business State: The Structure of Federal Corporations* 33 (1987) (FDIC is "self-supporting, financed mainly from insurance assessments paid by insured banks"); Dirk S. Adams, Rodney R. Peck, and Jill W. Spenser, *FIRREA and the New Federal Home Loan Bank System*, 32 Santa Clara L. Rev. 17, 26-29 (1992) (most of RTC's funding comes from private sources).

[30] 16 U.S.C. § 831a, 831n-4; *Hoke Co. v. Tennessee Valley Auth.*, 854 F.2d 820 (6th Cir. 1988) (adjudicating First and Fifth Amendment challenge to TVA's decision to contract with unionized contractor); *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980) (First Amendment challenge to TVA's building of dam); *see also Old Republic Ins. Co. v. Federal Crop Ins. Corp.*, 947 F.2d 269 (7th Cir. 1991) (due process challenge to procedures used by Federal Crop Insurance Corporation, a wholly owned government corporation, to recover insurance overpayments); *Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197, 201-02 (2d Cir. 1987) (due process challenge to termination of pension plans by Pension Benefit Guaranty Corporation, a wholly owned government corporation).

public services.[31] In determining whether such entities are subject to the Constitution, the Court must ask whether the government is responsible for the entity's "management or control." *Evans*, 382 U.S. at 301. Where government-sponsored corporations are privately financed, privately owned, and run by boards selected by their private owners, they may not be government actors, absent the performance of a traditional public function or some other connection to government.[32] Similarly, where the federal government has merely chartered a private non-profit corporation, but does not own or control it, the corporation is not a government actor.[33] But at a minimum, where a corporation is owned and controlled by government, is dependent on federal appropriations for its very existence, exercises governmental powers, and controls billions of dollars of government-purchased property, it should be treated as a government actor for constitutional purposes.[34]

[31] Leazes, *Accountability*, *supra* n.29 (arguing that government corporations, if treated as private, will not be accountable to the public); Ronald C. Moe and Thomas H. Stanton, *Government-Sponsored Enterprises as Federal Instrumentalities: Reconciling Private Management with Public Accountability*, 49 Pub. Admin. Rev. 321, 321 (1989) ("the United States has entered an era of 'quasi government' where functions of a public character are increasingly assigned to entities of a public character whose legal status has been designed to be deliberately ambiguous"); Harold J. Sullivan, *Privatization of Public Services: A Growing Threat to Constitutional Rights*, 47 Pub. Admin. Rev. 461 (Nov./Dec. 1987) (same).

[32] For example, "government-sponsored enterprises"—such as the Farm Credit Banks, Federal Home Loan Banks, Federal National Mortgage Association, and the Student Loan Marketing Association—are privately owned, do not depend on regular federal appropriations, and are run by boards comprised of a majority of private sector members. Moe and Stanton, *Government-Sponsored Enterprises*, *supra* n.31 at 322; *Report of the Secretary of the Treasury on Government-Sponsored Enterprises* 4 (1990).

[33] *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 545-47 & nn.27-29 (1987); 36 U.S.C. § 1101 (listing federally chartered private corporations).

[34] Several lower courts have held that where the government appoints a majority of an entity's Board, the entity is effectively con-

B. The Court of Appeals Erroneously Relied on a Statutory Label to Resolve the Government Action Inquiry

Notwithstanding Amtrak's objective governmental character, the court of appeals concluded that it should be treated as a private entity because one of the hundreds of statutory provisions prescribing Amtrak's structure, obligations, and powers states that it is "not . . . an agency, instrumentality, authority, or entity, or establishment of the United States Government." 45 U.S.C. § 541; Pet. App. 7a.[35]

trolled by government and therefore should be treated as a government actor. *Foster v. Ripley*, 645 F.2d 1142, 1147 (D.C. Cir. 1981) ("The fact that the majority of the members of the [private corporation's] board of directors are [government] officials in itself is sufficient to find that the government exercises control over the actions of the [private corporation]"); *McVarish v. Mid-Nebraska Community Mental Health Ctr.*, 696 F.2d 69, 71 (8th Cir. 1982) (fact that 12 of Board's 17 members "were either appointed by or actual members of county boards of supervisors or commissioners" is sufficient to establish state action); *Chiaffitelli v. Dettmer Hosp., Inc.*, 437 F.2d 429, 430 (6th Cir. 1971) (fact that four of nine board members are appointed by the government and a fifth is a public official is sufficient to make hospital a state actor).

While the Sixth Circuit has subsequently held that government appointment of a minority of a board's members does not in itself establish state action, *Adams v. Vandemark*, 855 F.2d 312, 317 (6th Cir. 1988) (no state action where government appointed one-third of board), *cert. denied*, 488 U.S. 1042 (1989); *Crowder v. Conlan*, 740 F.2d 447, 451 (6th Cir. 1984) (no state action where government appointed only two of eleven board members), it has stated that government involvement on the board is "perhaps the strongest indication of a symbiotic relationship." *Adams*, 855 F.2d at 317.

[35] Several lower courts have also relied upon this language in deeming Amtrak not a governmental actor for constitutional purposes. *See, e.g., Anderson v. National R.R. Passenger Corp. (Amtrak)*, 754 F.2d 202, 204 (7th Cir. 1984); *Wilson v. Amtrak Nat'l R.R. Passenger Corp.*, 824 F. Supp. 55, 58 (D. Md. 1992); *see also Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 681 (7th Cir. 1987) (relying on similar language to hold Conrail not a government actor). Other courts have offered no analysis whatsoever, but have simply followed other decisions. *See, e.g., Railway Labor Executives' Ass'n v. National R. R. Passenger Corp.*,

Congress obviously did not intend to, because it could not, resolve the constitutional state action question with such a statutory label. At most, this language has statutory significance by providing that Amtrak is not covered by certain statutes otherwise applicable to government agencies, such as the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*[36]

Moreover, to the extent statutory labels matter, Congress has repeatedly identified Amtrak as a governmental or public entity, subjecting it to numerous statutes designed to make it accountable to the public. Amtrak is a "government corporation" subject to the Government Corporations Control Act, 31 U.S.C. § 9101(2);[37] a "designated Federal entity" subject to the Inspector General Act, 5 U.S.C. app. 2 § 8G (Supp. V 1993); a "public entity" under the Americans with Disabilities Act, 42 U.S.C. § 12131(1); and an "agency" for purposes of the Freedom of Information Act and the Government in the Sunshine Act, 45 U.S.C. § 546(g); 5 U.S.C. § 552b; 49 C.F.R. Part 700 (1993).[38] None of these statutes applies to private corporations.

The ambivalent labels Congress has attached to Amtrak only underscore the fact that such labels cannot resolve the

691 F. Supp. 1516, 1524 n.11 (D.D.C. 1988); *Hankin v. National R. R. Passenger Corp.*, 86 Civ. 7233, 1987 U.S. Dist. LEXIS 10741, *7 (N.D. Ill. 1987); *cf. G & T Terminal Packaging Co. v Consolidated Rail Corp.*, 830 F.2d 1230, 1236 (3d Cir. 1987), *cert. denied*, 485 U.S. 988 (1988).

[36] *See Sentner v. Amtrak*, 540 F. Supp. 557, 561 (D.N.J. 1982) (interpreting 45 U.S.C. § 541 as a choice "not to make Amtrak a government entity, leaving it exposed to punitive liability, and thereby structuring a disincentive to dangerous misoperation"); *Ehm v. National R.R. Passenger Corp.*, 732 F.2d 1250, 1252 (5th Cir.), *cert. denied*, 469 U.S. 982 (1984) (Amtrak not subject to APA).

[37] Government corporations, in turn, are generally deemed to be "executive agenc[ies]." 5 U.S.C. § 105.

[38] For example, Congress subjected Amtrak to the FOIA because "in view of the substantial Federal funds which are going to Amtrak, the taxpaying public is entitled to access to information about the conduct of Amtrak affairs." S. Rep. No. 756, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 2393, 2397-98.

state action inquiry. It is not the formal label, but the objective indicia of governmental control and responsibility that determine whether an entity is a government actor for constitutional purposes. *Pennsylvania v. Board of Trustees*, 353 U.S. at 230; *Evans v. Newton*, 382 U.S. at 301. And Amtrak's objective characteristics are unambiguously governmental.[39]

C. If Amtrak Were Treated as a Private Entity, It Would Be Constitutionally Entitled to Allocate Speakers' Access to Government-Purchased Property on Politically Biased Criteria

As both Judges Leval and Newman pointed out below, treating Amtrak as a private entity would lead to "inconceivable" consequences. The consequences, moreover, would

[39] Perhaps misled by Congress's inconsistent labeling, this Court has twice—in dicta outside the state action context—described Amtrak as a "private, for-profit corporation." *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 112 S. Ct. 1394, 1398 (1992); *National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry Co.*, 470 U.S. 451, 454 (1985); *see also id.* 470 U.S. at 470 (characterizing Amtrak as a "nongovernmental corporation").

As explained above, while Amtrak was initially designated a "for-profit" corporation, that designation was abandoned in 1978. Moreover, it has always been designated a government corporation. In any event, the Court's prior characterizations of Amtrak were unnecessary to its decisions. In *Boston and Maine Corp.*, the Court merely upheld a property condemnation order of the Interstate Commerce Commission. In *Atchison, Topeka*, the Court sustained the constitutionality of a provision of the Rail Passenger Service Act (RPSA) requiring railroads to reimburse Amtrak for employee pass privileges. The Court stated in dicta that Amtrak's "Basic Agreements" were not between the railroads and the United States but "simply between the railroads and the nongovernmental corporation, Amtrak." 470 U.S. at 470. However, this characterization was not necessary to the Court's holding, because the Court found that "[a]bsolutely nothing in the RPSA or the Basic Agreements suggests that the railroads were relieved of the responsibility to reimburse Amtrak for the [pass privileges]." *Id.* at 478-79. Thus, even if the President himself had signed the Basic Agreements in his official capacity, it would not have altered the result.

extend far beyond Amtrak, leaving constitutionally unaccountable numerous entities that are governmental in every respect but name.

Under the court of appeals' holding, Amtrak is constitutionally free to allocate access to its billions of dollars of government-purchased property to whomever it chooses. It could sell advertising space only to the incumbent Administration during an election campaign. It could offer space only to those who advocate protection of reproductive choice or passage of President Clinton's health care bill, while denying access to those who are pro-life or oppose the President's bill. Not only would the First Amendment not be violated by such action, it would affirmatively *guarantee* Amtrak's right, as a private speaker, to make such choices. *Indeed, it would preclude Congress from statutorily barring such favoritism.*[40]

Nor would Amtrak's powers to discriminate stop there. If Amtrak is a private entity, it would be constitutionally free to charge discriminatory rates to women, Catholics, Republicans, or non-citizens. It could offer its property for some denominational religious services and not others. There are no

[40] The panel majority's only response to this concern was to note that federal election law would bar Amtrak, as a corporation, from *donating* its properties to a Presidential candidate during an election campaign. Pet. App. 11a. This response is insufficient for two reasons.

First, the election laws address only the narrow issue of *donations* to candidates; they have no applicability to a decision to *sell* advertising space only to the incumbent Administration, or to donate space for speech on public issues unconnected to a specific federal campaign.

Second, the fortuitous presence or absence of generic statutory prohibitions on private conduct does not determine whether an entity is a state actor. The fact that Congress has criminalized conspiracies to deprive individuals of their civil rights, for example, does not mean that private actors acting in concert with government officials are not also state actors for constitutional purposes. *West v. Atkins*, 487 U.S. 42 (1988). Whether Amtrak is a government actor does not turn on the vagaries of election law.

statutory bars to such conduct,[41] and if Amtrak is a private entity, the Constitution would not reach its conduct. Indeed, as a *constitutional* matter, Amtrak would be free to deny services on the basis of race.[42]

The point is not that Amtrak is about to embark on such conduct, but that if this Court treats Amtrak as private, it and many other entities like it on the federal, state and local level would be freed from conducting their activities in conformity with basic constitutional dictates. Congress could, for example, render the Resolution Trust Corporation free of its obligation to respect the property or due process rights of those against whom it acts. State and local entities could declare municipal hospitals, state universities, or public schools to be "private," and thereby effectively immunize their conduct from constitutional review, even as government authorities retained control and ownership.

Where a corporation is in fact private and independent of government control, as this Court found the United States Olympic Committee to be, it should generally not be bound by constitutional strictures. But where a corporation is controlled and owned by government, is fiscally dependent upon government for its continued survival, and controls billions of dollars of taxpayer-purchased property, it should not be treated as "something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes." *Cherry Cotton Mills v. U.S.*, 327 U.S. at 539.[43]

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41 Congress has expressly exempted Amtrak from all state, local or federal statutes and laws regarding rates and fares. 45 U.S.C. §§ 546(a)(1), (c).

42 While 42 U.S.C. § 1981 and Title VII, 42 U.S.C. § 2000e, would statutorily prohibit most racial discrimination, the Constitution would have nothing to say about it if Amtrak were a private entity.

43 Indeed, when it is to its advantage to do so, Amtrak itself has argued that it ought to be treated as a governmental entity. In *Sentner v. Amtrak*, 540 F. Supp. 557, 558, 560 & n.7 (D.N.J. 1982), Amtrak argued that it could not be subject to punitive damages because it enjoyed the sovereign immunity of the United States. In *Riddle v. National R.R. Passenger Corp.*, 831 F. Supp. 442, 445 (E.D. Pa. 1993), Amtrak argued that it was entitled to qualified official immunity for actions taken by its Office of the Inspector General. Amtrak did not prevail in either argument, but it nonetheless demonstrates that Amtrak sees itself as a governmental entity at least for some purposes.

II. EVEN IF AMTRAK IS TREATED AS A PRIVATE ENTITY, ITS DECISION TO REJECT LEBRON'S ADVERTISEMENT STILL CONSTITUTES GOVERNMENT ACTION

Even if Amtrak is not treated as a governmental entity for all constitutional purposes, it should be treated as a governmental actor for purposes of Lebron's challenge to its content-based policy selectively barring his political advertisement from Penn Station. This determination requires a "necessarily fact-bound inquiry" into the full range of government contacts with Amtrak. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). Because Amtrak's policy barring "objectionable" political advertisements and its application to Lebron are "fairly attributable" to the government, it is a government actor. *Id.* at 937.

The Court has "articulated a number of different factors or tests in different contexts" for discerning whether a private entity's conduct can be treated as government action. *Id.* at 939. If any one of these tests is satisfied, government action should be found. Amtrak's conduct is government action under two distinct tests: (1) Amtrak has a "symbiotic relationship" with the United States and several state entities with respect to advertising at Penn Station; and (2) the United States specifically "encouraged" the challenged conduct through Board policy and statutory dictate. In addition, the fact that Amtrak provides an essential public service that cannot be sustained by the private market and is now exclusively performed by government further supports a finding of government action.

A. Amtrak Has a Symbiotic Relationship with the United States and Several State Entities at Penn Station

A private entity's acts must be treated as government action where the government has "so far insinuated itself into a position of interdependence with [the entity] that it must be recognized as a joint participant in the challenged action." *Burton v. Wilmington Parking Auth.*, 365 U.S. at 725. As then-District Judge Leval found, the United States is far more insinuated into Amtrak's business than Delaware was with the Eagle Coffee Shoppe in *Burton*, and therefore *Burton* compels a finding of federal action here.

1. Amtrak's Governmental Ties Are Far More Extensive Than Those in *Burton v. Wilmington Parking Authority*

In *Burton*, a private restaurant in a public parking garage refused to serve black customers. In a case that is widely viewed as an icon of the civil rights movement, the Court cited three factors to support what Chief Justice Rehnquist later termed a "symbiotic relationship"[44] between the private actor and government: (1) close financial interdependence between the private and governmental entities, *Burton*, 365 U.S. at 724; (2) governmental authority over the private entity, *id.* at 725; and (3) the sharing of physical space between the private and governmental entities, *id.* at 724-25.

The *Burton* Court found first that Delaware's financial interests were closely tied to the restaurant's discrimination because the restaurant rented the property from the state; its customers parked in the state's garage; and the restaurant's rationale for discriminating was revenue-driven: it feared losing business from potential white customers. *Id.* at 724. Second, the Court noted that Delaware *could* have regulated the private restaurant's conduct as a condition of its lease. *Id.* at 725. And third, because the restaurant was "an integral part of

[44] *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972).

a public building devoted to a public parking service," the Court found it would be a "grave injustice" to permit conduct in the private sections of the building that was constitutionally prohibited in the public sections. *Id.* at 724-25. On each of these three criteria, the facts here are stronger than in *Burton*.

First, because the United States bankrolls Amtrak's losses, every dollar of Amtrak's revenues is a direct fiscal concern of the United States.[45] The financial ties in *Burton* were indirect at best; here, they could not be more direct if Amtrak were literally part of the Department of Transportation. Indeed, the Secretary of Transportation is the conduit through which Amtrak receives funds from Congress; must approve the issuance of certain stock; was required to "issue general guidelines designed to assist the Corporation in the formation of capital and budgetary plans;" and, until late 1992, prescribed the terms and conditions of Amtrak's loan guarantees.[46]

As in *Burton*, the government's financial interdependence extends to the specific policy at issue here. Just as the restaurant in *Burton* justified its exclusion of black customers on revenue grounds, so here Amtrak justified its policy and its application against Lebron by arguing that it might lose revenue from offended passengers. J.A. 15-16, 79-82. Thus, as in *Burton*, the government is a financial beneficiary of the challenged discriminatory policy.[47]

[45] Amtrak's President has routinely argued to Congress that any costs or taxes imposed on Amtrak will ultimately be borne by the United States. *See, e.g.*, C.A. Exh. 1334 (seeking exemption from Federal Employers' Liability Act because "any financial savings achieved will directly reduce Amtrak's need for federal financial assistance"); C.A. Exh. 1487-88 (arguing that imposing customs duty on Amtrak would have a net impact on federal government revenues of zero as Amtrak would require additional federal operating funds in just that amount to pay the duty).

[46] 45 U.S.C. §§ 544(d), 548(c), 563(a), 564(b), 601(a), and 602 (*repealed by* the Amtrak Authorization and Development Act, Pub. L. No. 102-533, § 7(c), 106 Stat. 3515, 3519 (Oct. 27, 1992)).

[47] Indeed, the United States has expressly directed Amtrak to structure its contracts with private entities so as to reduce the United States' financial support of Amtrak. *See infra* Section II.B.

Second, where the *Burton* Court found state action supported by the mere fact that Delaware *could have* regulated the restaurant's customer policy as a term of its lease, here Amtrak's Board of federal appointees is directly responsible for the policy at issue. Amtrak's Board is charged with managing the "property, affairs and business" of the corporation, J.A. 635 at § 4.01; D.C. Code Ann. § 29-332 (1981), and is therefore "responsible for the determination and execution of corporate policy."[48]

Through Amtrak's federally-appointed Board, the government controls and manages the corporation. In this case, moreover, the United States' ability to control Amtrak extends beyond its appointment of the Board. It owns all of Amtrak's voting stock. Amtrak is dependent upon federal funding every year for its continued existence. The property at issue—Penn Station—was purchased by and is mortgaged to the United States. Congress can and does override corporate policy and structure whenever it chooses.[49] In short, the United States has unlimited authority to control Amtrak's policies.

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[48] Harry G. Henn and John R. Alexander, *Laws of Corporations* 564 (1983). Even where the Board delegates management authority, delegation "does not relieve directors of their legal responsibility" for corporate acts. Henn and Alexander, *supra*, at 575; American Bar Association-American Law Institute Model Bus. Corp. Act § 8.30 (1991); American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* § 4.01(b) (May 13, 1992); Fletcher Cyclopedia of the Law of Private Corporations § 392 (1990 and Supp. 1993).

[49] While Amtrak is generally subject to D.C. corporations law, Congress's statute governs wherever there is a conflict. 45 U.S.C. § 541. Moreover, when the number of preferred shares issued to the United States reached the maximum authorized by Amtrak's Articles of Incorporation, Congress simply overrode the limit by statute. 45 U.S.C. § 541(c)(4). Congress has even gone so far as to dictate which employees Amtrak must hire, 45 U.S.C. § 1113, and which persons it may not hire, 45 U.S.C. § 543(d) (barring non-citizens from employment as Amtrak officers).

In *Burton*, the State of Delaware played no role in developing or implementing the challenged policy; it was enough that the State could have prohibited it through its lease. Here, Amtrak conceded that its federally-appointed Board has authority to approve or disapprove Amtrak's advertising policies. J.A. 166 at ¶ 59. Moreover, the Board itself approved the challenged policy. Amtrak's Vice President for Real Estate Anthony DeAngelo testified that the policy is reflected in several contracts between Amtrak and its advertising leasing agent, each of which had to be approved by the Board.[50]

Third, even more so than the parking garage at issue in *Burton*, Penn Station is a large public space shared by governmental and non-governmental entities. The property itself was purchased with federal tax dollars and is mortgaged to the federal government. And Amtrak's intermingling of space, personnel and services with state and city transportation authorities at Penn Station is so closely interwoven that the district court found that there is little way of telling where those authorities' space and responsibilities end and Amtrak's begin. Pet. App. 9b n.8. As in *Burton*, 365 U.S. at 724-25, it

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[50] In its Brief in Opposition to the Petition for a Writ of Certiorari, Amtrak argued that its Board had no knowledge of or role in the challenged policy. Br. in Opp. at 5, 13, 17 & n.10. The record demonstrates that Amtrak's Board expressly authorized a 1991 leasing contract containing language barring advertising "objectionable to Amtrak," which DeAngelo pointed to as authority for Amtrak's advertising policy. J.A. 401-02.

The policy is also reflected in a 1980 leasing contract approved by the Board. While discovery did not include Board minutes back to 1980, DeAngelo testified that the 1980 contract would have required Board approval if it were a new contract as opposed to a renewal. J.A. 42, 401-02. The 1980 contract is plainly a new contract, as it does not recite that it is a renewal, does not refer to any previous contract, and specifically states that "[t]here are no understandings or agreements of any kind between the parties . . . other than as set forth in this permit . . . [and the agreement] constitutes the entire agreement between [the parties] on the subject matter hereof." J.A. 269 at ¶ 39. In addition, it is similar to the 1991 contract, which the Board expressly authorized, so under the presumption of regularity, the Board is presumed to have acted similarly with respect to the 1980 contract.

would be "a grave injustice" to allow Amtrak to engage in the suppression of political speech that its indisputably governmental partners plainly could not undertake.[51]

2. The Court of Appeals Improperly Disregarded *Burton v. Wilmington Parking Authority*

Unless *Burton* is no longer good law, state action is mandated by the facts presented here. While the court of appeals questioned *Burton*'s authority based on academic commentators' criticisms, this Court has consistently cited *Burton* with approval in its state action decisions, has never suggested that *Burton* has been overruled, and expressly relied on *Burton* to find state action as recently as 1991.[52]

The only case the court of appeals cited as possibly curtailing *Burton*'s authority, *San Francisco Arts & Athletics*, 483 U.S. 522, in fact carefully distinguished *Burton*, noting that plaintiffs "failed to demonstrate that the Federal Government *can or does* exert any influence over the exercise of the USOC's enforcement decisions." 483 U.S. at 547 n.29 (emphasis added). The Court noted that

> '[t]he USOC is an independent body, and *nothing in its chartering statute gives the federal government the right to control that body or its officers* . . . [Nor was] the federal government . . . able to exercise any type of '*de facto*' control over the USOC.'

Id. at 545 n.27 (quoting *DeFrantz v. United States Olympic Comm.*, 492 F. Supp. 1181, 1194 (D.D.C.), *aff'd mem.*, 701 F.2d 221 (D.C. Cir. 1980)) (emphasis added). If the USOC had been owned by the United States, managed by a federally appointed Board, and dependent on federal funding for its existence, the government action result would undoubtedly have been different.

[51] *International Soc. for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701; *Penthouse Int'l v. Koch*, 599 F. Supp. 1338.

[52] *See, e.g., Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 621, 624 (1991); *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 547 n.29 (1987).

This Court relied on *Burton* to find state action as recently as 1991, when it held that private attorneys for private civil litigants should be treated as state actors when they exercise peremptory challenges. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). As in *Edmonson* and *Burton*, the federal government through its close interrelationship with Amtrak has " 'elected to place its power, property, and prestige behind' " Amtrak, and therefore Amtrak must be treated as a government actor. *Id.* at 624 (quoting *Burton*, 365 U.S. at 725).

The state action analysis applied in *Burton* and followed by this Court ever since examines the overall relationship of the government to a putatively private entity. Unlike the "nexus" test discussed below, the "symbiotic relationship" test does not require a direct showing that the state compelled or encouraged the challenged action. The Wilmington Parking Authority neither encouraged nor compelled the Eagle Coffee Shoppe to discriminate, nor did the state in *Edmonson* encourage or compel the private litigant to strike jurors on discriminatory grounds. Yet because of the symbolic, legal, and financial interconnections between the private actor and the state in those instances, the Court found state action.

It is critical that the Court retain the *Burton* test, particularly in view of the increasing tendency among governments at all levels to act through corporations, enterprises, and other entities that are not formally governmental. These institutions can wield significant power, and often have responsibility for allocating billions of dollars of taxpayers' funds. Precisely because they are quasi-governmental, they may often take action without an express directive from a formal governmental body. Where, as here, the entity itself is closely dependent upon and controlled by government, the Court should treat its actions as state action even absent some further showing of an express governmental directive.

B. The United States Encouraged the Suppression of Lebron's Speech Through Amtrak's Board-Sanctioned Policy

Even if Amtrak is not sufficiently intertwined with government to satisfy the "symbiotic relationship" test, it is nonetheless a government actor for purposes of Lebron's challenge because the government " 'has exercised coercive power [and] has provided such significant encouragement, either overt or covert, that [Amtrak's] choice must in law be deemed to be that of the [government].' " *San Francisco Arts & Athletics*, 483 U.S. at 546 (quoting *Blum v. Yaretsky*, 457 U.S. at 1004). Where the "symbiotic relationship" inquiry considers the overall interrelationship between government and a private entity, the "nexus" test focuses on the government's connection to the specific *act* in question. Here, Amtrak's advertising policy was the very basis for the action at issue.

Encouragement short of a specific mandate is sufficient to satisfy the "nexus" test. In *Robinson v. Florida*, 378 U.S. 153, 154 (1964), for example, a private restaurant owner requested that black and white customers "sitting in" at a segregated restaurant leave. The Court treated this request as state action because a Florida health regulation and manual encouraged (but did not require) segregation by mandating separate toilet facilities for blacks and whites in integrated restaurants. Similarly, in *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952), the Court treated a private bus company's practice of broadcasting radio programs in its buses and streetcars as state action where the Public Utilities Commission had held a hearing into the practice and permitted it to continue. More recently, this Court unanimously stated in *West v. Atkins*, 487 U.S. 42, 52 (1988), that the requisite "encouragement" could be shown if the private party's challenged decisions "were made on the basis of some rule of decision for which the State is responsible."

Here, the United States is responsible for two "rules of decision" that not only encouraged, but formed the basis for

the rejection of, Lebron's advertisement. First and most important, Amtrak's Board of federal appointees is responsible for the very rule of decision that Lebron challenges: the policy against "objectionable" political advertising. That policy was expressly cited as the reason for rejecting Lebron's advertisement. Since a federally appointed body is responsible for that policy, actions pursuant to it are federal action.

Second, Amtrak's policy was in turn encouraged by Congress's statutory mandate that Amtrak seek in its contracts with the private sector to maximize revenue in order "to minimize Federal subsidies." 45 U.S.C. § 501a(1), (14). DeAngelo testified that Amtrak's policy against political advertising, and his rejection of Lebron's advertisement in particular, were predicated on concern that such expression might reduce revenues by offending passengers. J.A. 79-82. Thus, Congress's mandate to maximize revenue encouraged Amtrak to bar controversial political speech.

Accordingly, even under the more stringent "nexus" or "rule of decision" test, which focuses on the government's responsibility for the specific conduct challenged, the government has sufficiently encouraged the conduct challenged here to establish federal action.[53]

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[53] The fact that Amtrak's federally-appointed Board is directly responsible for the corporate policy Lebron challenges distinguishes this case from many of the lower court decisions that have declined to hold Amtrak or Conrail a government actor. Virtually all those cases involved routine employment disputes in which an employee challenged his or her individual termination, but did not challenge a Board policy, as Lebron does here. *Anderson v. National R.R. Passenger Corp. (Amtrak)*, 754 F.2d 202, 204 (7th Cir. 1984) ("no allegation that the government is involved with Amtrak's personnel policies or decisions."); *Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 54 (2d Cir. 1985) (finding "nothing resembling federal supervision of day-to-day activities . . . so that its personnel decisions can be considered federal action"); *Marcucci v. National R.R. Passenger Corp.*, 589 F. Supp. 725, 728 and n.3 (N.D. Ill. 1984) ("no [federal] regulation or policy [ ] could have caused [plaintiff's dismissal]"); *Kimbrough v. National R.R. Passenger Corp.*, 549 F. Supp. 169, 173 (M.D. Ala. 1982). Under the

C. Intercity Rail Passenger Service Has Become an Exclusive Government Function

A finding of government action under any of the above theories is further supported by the fact that intercity rail passenger service is, by Congress's own estimation, an essential public service that cannot be provided by the private market without massive government intervention. The governmental nature of an entity's function may, taken together with other indicia of state involvement, support a state action finding. *Edmonson*, 500 U.S. at 624-25.

Lebron does not contend that Amtrak's provision of intercity rail passenger service is a "traditional public function," nor that Amtrak's function is sufficient in itself to establish government action.[54] However, the fact that Congress considers intercity rail passenger service essential to the public and that it cannot be provided without massive government intervention should weigh in favor of a finding of government action when taken together with the extensive government ties detailed above.

"encouragement" doctrine, many routine employment terminations may be neither "encouraged" nor "compelled" by the Board's policy, and would therefore not be government action under that doctrine. *Cf. Monell v. Department of Social Servs.*, 436 U.S. 658, 690-91 (1978) (municipality is liable for actions of its officers taken pursuant to policy, but not for employees' actions not authorized by policy). Under the "government entity" and "symbiotic relationship" tests advanced above, however, Amtrak's employment decisions would be subject to constitutional restraint, just as the employment actions of any government agency would.

[54] In some instances, a private entity's performance of a "traditional government function" is sufficient in itself to establish state action. *Marsh v. Alabama*, 326 U.S. 501 (1946) (company town run by private corporation treated as state actor for purposes of regulating access to sidewalks for distribution of literature); *Terry v. Adams*, 345 U.S. 461 (1953) (all-white preprimary election within private club is state action).

Congress created Amtrak "to salvage an essential system of intercity rail passenger service,"[55] in order "to meet the needs of commerce, the national defense, the environment, and the service requirements of passengers, United States mail, shippers, States and their political subdivisions." 45 U.S.C. § 701(a)(3). In essence, Congress was forced to nationalize the passenger railroad in order to save it from extinction.[56]

Today, there are no private intercity rail passenger companies in existence in the United States. Amtrak Vice-President DeAngelo testified that running a passenger railroad is no longer a viable private business. J.A. 59; *see also* Mark B. Tobey, *Costs, Benefits, and the Future of Amtrak*, 16 Transp. L.J. 245, 299 (1987) ("The elimination of Amtrak will have the obvious and immediate consequence of preventing the public from choosing rail passenger service as a form of transportation."). Intercity passenger rail service has become an exclusive government function.

The fact that Amtrak provides an essential public service that cannot be provided absent substantial government intervention further supports a finding of federal action here.

[55] H.R. No. 1580, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4735, 4738; *id.* at 4735 (Amtrak created "to prevent the complete abandonment of intercity rail passenger service").

[56] Donald Itzkoff, *Off the Track: The Decline of the Intercity Passenger Train in the United States* 99 (1985) (quoting Secretary of Transportation John A. Volpe testimony that the "only option for keeping [rail passenger] service intact—the only one we could think of—is a takeover of the railroads"). The House Report made clear that the "assumption of passenger train service by the corporation is intended to include *all* intercity passenger service." H.R. Rep. No. 1580, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4735, 4737 (emphasis added).

III. THE AMOUNT OF STATE INVOLVEMENT NECESSARY TO ESTABLISH STATE ACTION SHOULD NOT BE GREATER FOR FIRST AMENDMENT THAN FOR EQUAL PROTECTION CLAIMS

In finding that Amtrak is not a federal actor, the court of appeals held that "a less stringent standard for finding state action should be applied when racial or sexual discrimination is at issue . . . than when there is a claim of a First Amendment violation." Pet. App. 10a. Under this rationale, had Amtrak denied Lebron access because of the political content of his message *and* because of his gender, it might be a state actor for purposes of the gender discrimination claim, but not for the First Amendment claim.

While Lebron maintains that Amtrak is a governmental actor no matter what state action standard is applied, the court of appeals' decision to hold him to a higher standard is contrary to this Court's decisions and to the purposes of the state action doctrine. The Court has repeatedly applied state action tests articulated in race discrimination settings to cases raising other constitutional claims, and vice versa. Thus, the Court has applied the *Burton* "symbiotic relationship" analysis to First Amendment and due process claims.[57] In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, the Court held that the state action rule for a due process challenge was "the same as that articulated in *Adickes v. S.H. Kress & Co.*, 398 U.S. [144,] 152 [1970], in the context of an equal protection deprivation." 457 U.S. at 941.[58]

[57] *Rendell-Baker v. Kohn*, 457 U.S. 830, 842-43 (1982) (applying *Burton* analysis to First Amendment claim); *Blum v. Yaretsky*, 457 U.S. 991, 1010-11 (1982) (applying *Burton* analysis to due process claim); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357-58 (1974) (applying *Burton* analysis to due process claim); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 119 (1973) (applying *Burton* analysis to First Amendment claim).

[58] The Second Circuit's holding stands alone among other courts of appeals. All of the other circuits that have addressed the issue have either explicitly or implicitly rejected a differential standard. Four circuits have expressly held that the state action standard does not differ depending on the constitutional right asserted. *Downs v. Sawtelle*, 574 F.2d 1, 6 n.5 (1st Cir.) (declining to adopt differential state action analysis, and stating that in any event court would apply same standard to discrimination and fundamental rights claims), *cert. denied*, 439 U.S. 910 (1978); *Adams v. Southern California First Nat'l Bank*, 492 F.2d 324, 333 n.23 (9th Cir. 1973) (rejecting differential state action analysis), *cert. denied*, 419 U.S. 1006 (1974); *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16, 19 (5th Cir.) (en banc) (*Burton* state action test applies "in both racial and non-racial cases"), *cert. denied*, 429 U.S. 872 (1976); *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818 (7th Cir. 1975) (Stevens, J.) (state action analysis identical for due process and equal protection claims), *cert. denied*, 425 U.S. 943 (1976).

In addition, the Third, Fourth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits have implicitly rejected such a heightened requirement, applying the "symbiotic relationship" standard established in *Burton*, a race discrimination case, to other constitutional claims. *Wolotsky v. Huhn*, 960 F.2d 1331 (6th Cir. 1992) (applying *Burton* analysis to due process and equal protection claim based on homosexual conduct); *Milo v. Cushing Mun. Hosp.*, 861 F.2d 1194 (10th Cir. 1988) (relying on *Burton* to find state action for First Amendment and due process claims by doctors challenging suspension by hospital); *Anderson v. USAir, Inc.*, 818 F.2d 49, 56 (D.C. Cir. 1987) (applying *Burton* analysis to Fifth Amendment claim against airline); *Jackson v. Pantazes*, 810 F.2d 426, 430 (4th Cir.1987) (finding state action under *Burton* analysis for a Fourth Amendment claim against private bail bondsman); *Morast v. Lance*, 807 F.2d 926, 931 (11th Cir. 1987) (applying *Burton* analysis to First and Fifth Amendment claims against bank); *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94 (3d Cir. 1984) (finding state action under *Burton* analysis for First Amendment, due process, and sex discrimination claims), *cert. denied*, 471 U.S. 1015 (1985); *Ruffalo v. Civiletti*, 702 F.2d 710 (8th Cir. 1983) (finding state action in due process challenge, stating that *Burton* standard "is equally applicable to cases involving federal government action under the Fifth Amendment").

The court of appeals' sliding scale makes no sense in light of the purpose of the state action doctrine: to determine when a putatively private entity should be treated as an official actor, not to create a hierarchy of constitutional rights. The state action doctrine accordingly looks to the nature of government involvement in a private entity's actions, the character of the function exercised by the private entity, and other factors that demonstrate government responsibility for an oth-

erwise "private" entity's acts. None of these inquiries should vary depending on the particular constitutional right asserted.[59]

Even if some sort of sliding scale were appropriate, there is no basis for saying that more state involvement need be shown for First Amendment than for sex and race discrimination claims. Under this Court's jurisprudence, a claim of sex discrimination triggers a *lower* standard of scrutiny than a claim of discrimination on the basis of political content.[60] A decision to exclude a speaker because of his political viewpoint triggers the same strict scrutiny as a decision to exclude a speaker because of his race.[61] Thus, to hold that a higher degree of state involvement is required for First Amendment

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[59] *See Parks v. "Mr. Ford"*, 556 F.2d 132, 153-54 (3d Cir. 1977) (Gibbons, J., concurring) (applying different state action tests would impermissibly allow judges to impose subjective hierarchy of constitutional rights); *Isaacs v. Board of Trustees of Temple Univ.*, 385 F. Supp. 473, 485 n.11 (E.D. Pa. 1974) (Higginbotham, J.) (rejecting argument that courts "should be more reluctant to find 'state action' in cases which do not involve racial discrimination," because it is impossible to create a hierarchy of constitutional rights); Jody Young Jakosa, *Parsing Public From Private: The Failure of Differential State Action Analysis*, 19 Harv. C.R.-C.L. L. Rev. 193 (1984) (differential state action analysis based on hierarchy of rights is inconsistent with purposes of doctrine).

[60] *Compare Texas v. Johnson*, 491 U.S. 397 (1989) (requiring compelling state interest and narrowly tailored means to justify content-based restriction on speech) *with Craig v. Boren*, 429 U.S. 190 (1976) (applying intermediate scrutiny to sex discrimination claims).

[61] *Compare Texas v. Johnson*, 491 U.S. 397, *with Palmore v. Sidoti*, 466 U.S. 429 (1984) (strict scrutiny required for racial discrimination). Indeed, because speech is a "fundamental right," its selective deprivation triggers strict scrutiny under equal protection analysis as well. *Carey v. Brown*, 447 U.S. 455, 474 (1980); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *see also Downs v. Sawtelle*, 574 F.2d at 6 n.5 (even if some differential analysis were justifiable, same state action analysis should apply to discrimination claim regarding fundamental rights as to racial discrimination claim).

than for equal protection claims contravenes this Court's established constitutional doctrine.

The First Amendment is as fundamental to our democratic tradition and individual liberties as the Equal Protection Clause. When a nominally "private" entity controlled, owned, and funded by government discriminates against unpopular speakers, it is just as much a state actor as when it discriminates on the basis of gender or race.

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals should be reversed, and the case remanded for determination of Lebron's First Amendment claim.

Respectfully submitted,

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STATUTORY APPENDIX

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SUBCHAPTER I—GENERAL PROVISIONS

§ 501. Congressional findings

(a) The Congress finds that the public convenience and necessity require that the National Railroad Passenger Corporation provide, to the extent that the Corporation's budget allows, modern, cost-efficient, and energy-efficient intercity railroad passenger[1] service between crowded urban areas and in other parts of the country; that rail passenger service can help in alleviating the overcrowding of airways, airports, and highways; and that to the maximum extent feasible, travelers in America should have the freedom to choose the mode of transportation most convenient to their needs.

(b) The Congress further finds that a greater degree of cooperation is necessary among railroads, the Corporation, State, regional, and local governments and the private sector, labor organizations, and suppliers of services and equipment to the Corporation in order to achieve the level of performance sufficient to justify expenditure of public funds.

(c) The Congress further finds that—

(1) modern, efficient commuter rail passenger service is important to the viability and well-being of major urban areas and to the national goals of energy conservation and self-sufficiency;

(2) Amtrak, as a passenger service entity, should be available to operate commuter service through its subsidiary Amtrak Commuter under contract with commuter agencies which do not choose to operate such service themselves as a part of the governmental functions of the State;

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[1] So in original. Should be "passenger."

(3) the Northeast Corridor is a valuable national resource used by intercity passenger, commuter passenger, and freight services; and

(4) greater coordination between intercity and commuter passenger services are required.

§ 501a. Goals

The Congress hereby established the following goals for Amtrak:

(1) Exercise of the Corporation's best business judgment in taking actions to minimize Federal subsidies, including increasing fares, increasing revenues from the carriage of mail and express, reducing losses on food service, improving its contracts with operating railroads, reducing management costs, and increasing employee productivity.

(2) Encouragement of State, regional, and local governments and the private sector to share the costs of operating rail passenger service, including the costs of operating stations and other facilities, in order to minimize Federal subsidies.

(3) Improvement of the number of passenger miles generated systemwide per dollar of Federal funding by at least 30 percent within the two-year period beginning on October 1, 1981.

(4) Elimination of the deficit associated with food and beverage services by September 30, 1982.

(5) Implementation of strategies to achieve immediately maximum productivity and efficiency consistent with safe and efficient service.

(6) Operation of Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetable for such operation.

(7) Development of service on rail corridors, subsidized by States or private parties, or both.

(8) Implementation of schedules which provide a systemwide average speed of at least 60 miles per hour, and which can be adhered to with a degree of reliability and passenger comfort.

(9) Improvement of the feasibility of State-subsidized service through the use of technical assistance panels to coordinate, plan, and implement such service.

(10) Encouragement of rail carriers to assist in improving intercity rail passenger service.

(11) General improvement of Amtrak's performance through comprehensive, systematic operational programs and employee incentives.

(12) Implementation of policies ensuring equitable access to the Northeast Corridor by both intercity and commuter services.

(13) Coordination among the various uses of the Northeast Corridor, particularly intercity and commuter passenger services.

(14) Amtrak's maximization of the use of its resources, including the most cost-effective use of employees, facilities, and real estate. Amtrak is encouraged to enter into agreements with the private sector and undertake initiatives which are consistent with good business judgment and designed to maximize its revenues and minimize Federal subsidies.

§ 502. Definitions

For the purposes of this chapter—

(1) "Amtrak" means the National Railroad Passenger Corporation created under subchapter III of this chapter.

(2) "Amtrak Commuter" means the Amtrak Commuter Services Corporation created under subchapter V of this chapter.

(3) "Auto-ferry service" means intercity rail passenger service characterized by transportation of automobiles or recreational vehicles and their occupants, and, when space is available, of used unoccupied vehicles.

(4) "Avoidable loss" means the avoidable costs of providing passenger service, less revenues attributable thereto, as determined by the Interstate Commerce Commission under the provisions of section 553 of title 5.

(5) "Basic system" means (A) prior to October 1, 1979, the system of intercity rail passenger service designated by the Secretary under subchapter II of this chapter and section 563(a) of this title, and (B) on and after October 1, 1979, the system of intercity rail passenger service designated by the Secretary under section 4 of the Amtrak Improvement Act of 1978 (Public Law 95-421) and approved by the Congress, and service required to be operated under sections 564(d) and 564(e)[2] of this title and under section 4(g) of the Amtrak Improvement Act of 1978, including changes to such system or service made by the Corporation using the Route and Service Criteria.

(6) "Center" means the Performance Evaluation Center established under section 545 of this title.

(7) "Commission" means the Interstate Commerce Commission.

(8) "Commuter authority" means any State, local, or regional authority, corporation, or other entity established for purposes of providing commuter service, and includes the Metropolitan Transportation Authority, the

[2] See Reference in Text note below.

Connecticut Department of Transportation, the Maryland Department of Transportation, the Southeastern Pennsylvania Transportation Authority, the New Jersey Transit Corporation, the Massachusetts Bay Transportation Authority, the Port Authority Trans-Hudson Corporation, any successor agencies, and any entity created by one or more such agencies for the purpose of operating, or contracting for the operation of, commuter service.

(9) "Commuter service" means short-haul rail passenger service operated in metropolitan and suburban areas, whether within or across the geographical boundaries of a State, usually characterized by reduced fare, multiple-ride, and commutation tickets and by morning and evening peak period operations.

(10) "Corporation" means the National Railroad Passenger Corporation created under subchapter III of this chapter.

(11) "Intercity rail passenger service" means all rail passenger service other than commuter service.

(12) "Model Program" means a program carried out by the Corporation under section 646 or section 648 of this title and the employee assistance program established by the Corporation.

(13) "Northeast Corridor" has the meaning given such term in section 851(c) of this title.

(14) "Panel" means a Technical Assistance Panel established under section 563(b) of this title.

(15) "Rail carrier" and "railroad" mean a person providing railroad transportation for compensation.

(16) "Regional transportation agency" means an authority, corporation, or other entity established for the purpose of providing passenger service within a region.

(17) "Route and Service Criteria" means the Criteria and Procedures for Making Route and Service Decisions established pursuant to section 564(c) of this title.

(18) "Secretary" means the Secretary of Transportation or his delegate unless the context indicates otherwise.

SUBCHAPTER II—
BASIC NATIONAL RAIL PASSENGER SYSTEM

Subchapter Referred to in Other Sections

This subchapter is referred to in section 502 of this title.

§ 521. Designation of system

In carrying out the congressional findings and declaration of purpose set forth in subchapter I of this chapter, the Secretary, acting in cooperation with other interested Federal agencies and departments, is authorized and directed to submit to the commission and to the Congress within thirty days after October 30, 1970, his preliminary report and recommendations for the basic system. Such recommendations shall specify those points between which intercity passenger trains shall be operated, identify all routes over which service may be provided, and the trains presently operated over such routes, together with basic service characteristics of operations to be provided within the basic system, taking into account schedules, number of trains, connections, through car service, and sleeping, parlor, dining, and lounge facilities. In recommending the basic system the Secretary shall take into account the need for expeditious intercity rail passenger service within and between all regions of the continental United States, and the Secretary shall consider the need for such service within the States of Alaska and Hawaii and the Commonwealth of Puerto Rico. In formulating such recommendations the Secretary shall consider opportunities for provision of faster service, more convenient service, service

to more centers of population, and service at lower cost, by the joint operation, for passenger service, of facilities of two or more railroad companies; the importance of a given service to overall viability of the basic system; adequacy of other transportation facilities serving the same points; unique characteristics and advantages of rail service as compared to other modes of transportation; the relationship of public benefits of given services to the costs of providing such services; and potential profitability of the service. The exclusion of a particular route, train, or service from the basic system shall not be deemed to create a presumption that the route, train, or service is not required by public convenience and necessity in any proceeding under section 10908 and 10909 of title 49.

§ 522. Review of the basic system

The Commission, the State Commissions, the representatives of the railroads, and labor organizations duly authorized under the Railway Labor Act [45 U.S.C. 151 et seq.] to represent railroad employees shall, within thirty days after receipt of the preliminary report of the Secretary designating the basic system, review such report consistent with the purposes of this chapter and provide the Secretary with their comments and recommendations in writing. The Secretary shall give due considerations to such comments and recommendations. The Secretary shall, within ninety days after October 30, 1970, submit his final report designating the basic system to the Congress. Such final report shall include a summary of their recommendations together with his reasons for failing to adopt any such recommendation. The basic system as designated by the Secretary shall become effective for the purposes of this chapter upon the date that the final report of the Secretary is submitted to Congress and shall not be reviewable in any court.

SUBCHAPTER III—
NATIONAL RAILROAD PASSENGER CORPORATION

Subchapter Referred to in Other Sections

This subchapter is referred to in sections 502, 1104 of this title.

§ 541. Establishment of the Corporation

There is authorized to be created a National Railroad Passenger Corporation. The Corporation shall be operated and managed as a for profit corporation, the purpose of which shall be to provide intercity and commuter rail passenger service, employing innovative operating and marketing concepts so as to fully develop the potential of modern rail service in meeting the Nation's intercity and commuter passenger transportation requirements. The Corporation will not be an agency, instrumentality, authority, or entity, or establishment of the United States Government. It shall be subject to the provisions of this chapter and, to the extent consistent with this chapter, to the District of Columbia Business Corporation Act [D.C. Code, sec. 29-301 et seq.]. The right to repeal, alter, or amend this chapter at any time is expressly reserved.

§ 542. Incorporation

The President of the United States shall appoint not fewer than three incorporators, by and with the advice and consent of the Senate, who shall also serve as the board of directors for one hundred and eighty days following October 30, 1970. The incorporators shall take whatever actions are necessary to establish the Corporation, including the filing of articles of incorporation, as approved by the President.

(Pub. L. 91-518, title III, § 302, Oct. 30, 1970, 84 Stat. 1330.)

§ 543. Directors and officers

(a) Number; qualifications; appointment; compensation and allowances

(1) The Corporation shall have a board of directors consisting of nine individuals who are citizens of the United States, as follows:

(A) The Secretary of Transportation, ex officio. The Secretary of Transportation may be represented at meetings of the Board by his deputy, the Administrator of the Federal Railroad Administration or the General Counsel of the Department of Transportation.

(B) The President of the Corporation.

(C) Three members appointed by the President, by and with the advice and consent of the Senate, on the following basis;

(i) One to be selected from a list of three qualified individuals recommended by the Railway Labor Executives Association.

(ii) One to be selected from among the Governors of State with an interest in rail transportation. Such Governor may select an individual to represent him at meetings of the Board.

(iii) One to be selected as a representative of business with an interest in rail transportation.

(D) Two members selected by commuter authorities, on the following basis.

(i) Until January 1, 1983, the two members under this subparagraph shall be selected by the President from a list of names consisting of one individual nominated by each commuter authority for which the Consolidated Rail Corporation operates commuter service under the Regional Rail Reorganization Act of 1973 [45 U.S.C. 701 et seq.]. Such

members shall serve until December 31, 1982, or until their successors are appointed pursuant to subparagraph (ii).

(ii) After January 1, 1983, the two members under this subparagraph shall be selected by the President from a list of names consisting of one individual nominated by each commuter authority for which Amtrak Commuter operates commuter service under subchapter V of this chapter and one individual nominated by each commuter authority in the Region (as defined in section 102 of the Regional Rail Reorganization Act of 1973 [45 U.S.C. 702]) which operates its own service or contracts with an operator other than Amtrak Commuter, except that—

(I) if Amtrak Commuter operates commuter service for one or more commuter authorities, at least one of the members selected under this clause shall be an individual nominated by such a commuter authority; and

(II) if Amtrak Commuter does not operate commuter service for any commuter authority, five names shall be submitted to the President by commuter authorities providing service over rail properties owned by Amtrak, and the President shall select two members from such list.

(E) Two members selected by the preferred stockholders of the Corporation, who each shall serve for a term of one year or until successors have been appointed.

(2)(A) Members appointed by the President under paragraph (1)(C) shall serve for terms of four years or until their successors have been appointed and qualified, except that any member appointed by the President under such subparagraph to fill a vacancy shall be appointed only for the unexpired term of the member he is appointed to succeed. Not more than

two of the members appointed under such subparagraph shall be registered as members of the same political party.

(B) Members selected under paragraph (1)(D) shall serve for terms of two years or until their successors have been appointed.

(3) Except as provided in paragraph (2)(A) of this subsection, any vacancy in the membership of the board shall be filled in the same manner as in the case of the original selection.

(4) The President of the Corporation shall serve as chairman of the board of directors.

(5) Each member not employed by the Federal Government shall receive compensation at the rate of $300 per diem when engaged in the actual performance of duties. In addition, each member shall be reimbursed for necessary travel, secretarial or professional staff support which is reasonably required and subsistence expenses incurred in attending meetings of the board.

(6) No member appointed by the President may—

(A) have any direct or indirect financial or employment relationship with any railroad, nor

(B) have any significant direct or indirect financial relationship, or any direct or indirect employment relationship, with any person engaged in the transportation of passengers in competition with the Corporation, during the time that he serves on the board.

(7) Pending the selection of the two members by the preferred stockholders of the Corporation under paragraph (1)(D) of this subsection, four members shall constitute a quorum for the purpose of conducting the business of the board.

(8) Any vacancy in the membership of the board of directors required to be filled by appointment by the President under paragraph (1)(B) of this subsection shall be filled by the President not more than one hundred and twenty days after such vacancy occurs.

(b) Bylaws

The board of directors is empowered to adopt and amend bylaws governing the operation of the Corporation. Such bylaws shall not be inconsistent with the provisions of this chapter or of the articles of incorporation.

(c) Stock conversion and voting rights

The articles of incorporation of the Corporation shall provide for cumulative voting for all stockholders and shall provide that, upon conversion of one-fourth of the outstanding shares of preferred stock, the common stockholders shall be entitled to elect four directors and the preferred stockholders shall be entitled to elect three directors; upon the conversion of one-half of the outstanding shares of preferred stock, the common stockholders shall be entitled to elect five directors and the preferred stockholders shall be entitled to elect two directors; upon the conversion of three-fourths of the outstanding shares of preferred stock, the common stockholders shall be entitled to elect six directors and the preferred stockholders shall be entitled to elect one director; and upon conversion of all outstanding shares of preferred stock, the common stockholders shall be entitled to elect seven directors. Any change of directors resulting from such stock conversion shall take effect at the next annual meeting of the Corporation following such stock conversion.

(d) Appointment; tenure; duties of president and other officers

The Corporation shall have a president and such other officers as may be named and appointed by the board. The rates

of compensation of all officers shall be fixed by the board. The president and other officers of the Corporation shall receive compensation at a level no higher than the general level of compensation paid officers of railroads in positions of comparable responsibility. Officers shall serve at the pleasure of the board. No individual other than a citizen of the United States may be an officer of the Corporation. No officer of the Corporation may have any direct or indirect employment or financial relationship with any railroad during the time of his employment by the Corporation; except that the holding of securities issued by a railroad shall not be deemed to be violative of this prohibition: *Provided*, That the officer who holds such securities recuses himself from any decisions which bear directly on such railroad, and makes full public disclosure of such holdings.

§ 544. Common and preferred stock

(a) Issuance; par value; dividends

The Corporation is authorized to issue and have outstanding, in such amounts as its shall determine, two issues of capital stock, a common and a preferred, which shall be eligible for dividends. Preferred stock may be issued to and held only by and person other than (1) a railroad or (2) any person controlling one or more railroads, as defined in section 10102 of title 49. The articles of incorporation of the Corporation shall provide for the following respective rights of each issue of stock:

(A) COMMON STOCK.—Common stock shall have a par value of $10 per share and shall be designated fully paid and nonassessable. No dividends shall be paid on the common stock whenever dividends on the preferred stock are in arrears.

(B) PREFERRED STOCK.—(i) Preferred stock shall have a par value of $100 per share and shall be designated fully paid and nonassessable. Dividends shall be

fixed at a rate not less than 6 per centum per annum, and shall be cumulative so that, if for any dividend period dividends at the rate fixed in the articles of incorporation shall not have been declared and paid or set aside for payment on the preferred shares, the deficiency shall be declared and paid or set apart for payment prior to the making of any dividend or other distribution on the common shares.

(ii) Preferred stock shall be entitled to a liquidation preference over common stock, which shall entitle preferred stockholders to a liquidating payment not less than par value plus all accrued unpaid dividends prior to any payment on liquidation to common stockholders.

(iii) Preferred stock shall be convertible into shares of common stock at such time and upon such terms as the articles of incorporation shall provide.

(b) Limitations on voting common stock

At no time after the initial issue is completed shall the aggregate of the shares of common stock of the Corporation voted by a single railroad or by any person controlling one or more railroads, as defined in section 10102 of title 49, directly or indirectly through subsidiaries or affiliated companies, nominees, or any person subject to its direction or control, exceed 33 1/3 per centum of such shares issued and outstanding. If any railroad or any person controlling one or more railroads, as defined in section 10102(6) of title 49, owns, directly or indirectly through subsidiaries or affiliated companies, nominees, or any person subject to its direction or control, a number of shares in excess of 33 1/3 per centum of the total number of common shares issued and outstanding, such excess number shall, for voting and quorum purposes, be deemed to be not issued and outstanding.

(c) Preferred stock issued to Secretary; dates of issuance

(1) Not later than February 1, 1982, and in consideration of receiving further Federal financial assistance, the Corporation shall issue to the Secretary a sufficient number of shares of preferred stock to equal, to the nearest whole share, the amount of funds appropriated by Congress for capital acquisitions or improvements, or for operating and capital expenses, under the authority of subsections (a)(2), (b)(1)(B), and (b)(1)(C) of section 601 of this title between October 30, 1970, and September 30, 1981.

(2) Commencing on October 1, 1981, and in consideration of receiving further Federal financial assistance, the Corporation shall issue to the Secretary within 30 days after the close of each quarter of the fiscal year of the United States Government additional preferred stock equal, to the nearest whole share, to the amount of funds paid to the Corporation under section 601 of this title during such quarter.

(3) The preferred stock issued pursuant to paragraphs (1) and (2) of this subsection shall be deemed to have been issued as of the date of receipt by the Corporation of the funds for which such stock is issued.

(4) No amendment to the articles of incorporation of the Corporation shall be required for the issuance of the preferred stock required to be issued pursuant to this subsection.

(d) Issuance of nonvoting securities, bonds, notes, and other certificates of indebtedness; liquidation interest

The Corporation is authorized to issue, in addition to the stock authorized by subsection (a) of this section, nonvoting securities, bonds, debentures, notes, and other certificates of indebtedness as it may determine, except that no obligation with a liquidation interest superior to any preferred stock issued to the Secretary or secured by a lien on property of the Corporation shall be incurred without the consent of the Sec-

retary so long as any preferred stock issued to the Secretary is outstanding.

(e) Rights of inspection and copying; fee or other taxation

(1) The requirement of section 45(b) of the District of Columbia Business Corporation Act (D.C. Code, sec. 29-920(b) [§ 29-345(b)]) as to the percentage of stock a stockholder is required to hold in order to have the rights of inspection and copying set forth in such section shall not be applicable in the case of holders of the stock of the Corporation, and they may exercise such rights without regard to the percentage of stock they hold.

(2) Preferred stock issued under the authority of this section shall not be subject to the annual fee prescribed under section 29-936(3) [§ 29-399.22(e)]) of the District of Columbia Code, or to any other form of taxation unless otherwise specifically prescribed by Congress.

§ 545. General powers

(a) Corporate powers attendant to operation of intercity and commuter trains for the transportation of passengers, mail, and express

The Corporation is authorized to own, manage, operate, or contract for the operation of intercity and commuter trains operated for the purpose of providing modern, efficient, intercity and commuter transportation of passengers and to carry mail and express of such trains; to conduct research and development related to its mission; and to acquire by construction, purchase, or gift, or to contract for the use of, physical facilities, equipment, and devices necessary to rail passenger operations. Insofar as practicable, the Corporation shall directly operate and control all aspects of its rail passenger service. To carry out its functions and purposes, the Corporation shall have the usual powers conferred upon a

stock corporation by the District of Columbia Business Corporation Act [D.C. Code, § 29-301 et seq.].

(b) Revenue increases; auto-ferry service; assistance of Federal departments and agencies

The Corporation shall take such actions as may be necessary to increase its revenues from the carriage of mail and express. In order to increase revenues and to better accomplish the purposes of this chapter, the Corporation is authorized to modify its services to provide auto-ferry service as a part of the basic passenger services authorized by this chapter, except that nothing contained in this chapter shall prevent any other person, other than a railroad (except that for purposes of this section a person primarily engaged in auto-ferry service shall not be deemed to be a railroad), from providing such auto-ferry service over any route in accordance with a certificate issued by the Commission if—

(1) the Commission finds that such auto-ferry service—

(A) will not impair the ability of the Corporation to reduce its losses or to increase its revenues, and

(B) is required to meet the demands of the public, or

(2) such auto-ferry service is being performed by such person on November 3, 1973, under contracts entered into before October 30, 1970.

Nothing in this section shall be construed to restrict the right of a railroad that has not entered into a contract with the Corporation for the provision of rail passenger service from performing auto-ferry service over its own lines. The Corporation is authorized to acquire, lease, modify, or develop the equipment and facilities required for the efficient provision of mail, express, and auto-ferry service, or to enter into contracts for the provision of such service. Upon request by

the Corporation, Federal departments and agencies shall, consistent with the provisions of existing law, provide such assistance as may be necessary in carrying out the purposes of this subsection.

(c) Transportation and reduced fare program for elderly and handicapped individuals

(1) The Corporation is authorized to take all steps necessary to insure that no elderly or handicapped individual is denied intercity transportation on any passenger train operated by or on behalf of the Corporation, including but not limited to, acquiring special equipment and devices and conducting special training for employees; designing and acquiring new equipment and facilities and eliminating architectural and other barriers in existing equipment and facilities to comply with the highest standards for the design, construction, and alteration of property for the accommodation of elderly and handicapped individuals; and providing special assistance while boarding and alighting and in terminal areas to elderly and handicapped individuals.

(2)(A) Within 90 days after September 29, 1979, the Corporation shall establish a reduced fare program for elderly and handicapped individuals.

(B) For purposes of this paragraph—

(i) the term "elderly individual" means a person who has attained the age of 65 years; and

(ii) the term "handicapped individual" means any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has record of such an impairment, or is regarded as having such an impairment, but the term handicapped individual does not include any person who is an alcoholic or drug abuser.

(d) Acquisition of property; declaration of taking; property compensation; procedures; transfer of title

(1) The Corporation is authorized, to the extent financial resources are available--

(A) to acquire any property which the Secretary, acting in furtherance of his responsibility to design and construct an intermodal transportation terminal at Union Station in the District of Columbia, requests, upon assurance of full reimbursement by the Secretary; and

(B) to acquire any right-of-way, land, or other property (except right-of-way, land, or other property of a railroad or property of a State or political subdivision thereof or of any other governmental agency), which is required[3] intercity rail passenger service; by the exercise of the right of eminent domain, in accordance with the provisions of this subsection, in the district court of the United States for the judicial district in which such property is located or in any such court if a single piece of property is located in more than one judicial district: *Provided*, that such right may only be exercised when the Corporation cannot acquire such property by contract or is unable to agree with the owner as to the amount of compensation to be paid.

(2) The Corporation shall file with the complaint, or at any time before judgment, a declaration of taking containing or having annexed thereto—

(A) a statement of the public use for which the property is taken;

(B) a description of the property taken sufficient for the identification thereof;

(C) a statement of the estate or interest in the property taken;

(D) a plan showing the property taken; and

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[3] So in original. Probably should be "required for".

(E) a statement of the amount of money estimated by the Corporation to be just compensation for the property taken.

(3) Upon the filing of the declaration of taking and the depositing in the court of the amount of money estimated in such declaration to be just compensation for the property, the property shall be deemed to be condemned and taken for the use of the Corporation. Title to such property shall thereupon vest in the Corporation in fee simple absolute or in any lesser estate or interest specified in the declaration of taking, and the right to the money deposited as estimated just compensation shall immediately vest in the persons entitled thereto. The court, after a hearing, shall make a finding as to the amount of money which constitutes just compensation for such property and shall make an award and enter judgment accordingly. Such judgment shall include, as part of the just compensation awarded, interest on the amount finally awarded as the value of the property on the date of taking minus the amount deposited in the court on such date, at the rate of 6 per centum per annum from the date of taking to the date of payment.

(4) Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in the proceeding. If the compensation finally awarded exceeds the amount of the money received by any person entitled to compensation, the court shall enter judgment against the Corporation for the amount of the deficiency.

(5) Upon the filing of a declaration of taking, the court may fix the time within which, and the terms upon which, the parties in possession are required to surrender possession to the Corporation. The court may make such orders in respect to encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

(e) Improvement of service and equipment; research and development; demonstration programs; international rail passenger service; other corporate purposes

The Corporation is authorized to take all steps necessary to—

(1) establish improved reservations systems and advertising;

(2) service, maintain, repair, and rehabilitate railroad passenger equipment;

(3) conduct research and development and demonstration programs respecting new rail passenger services;

(4) develop and demonstrate improved rolling stock;

(5) establish and maintain essential fixed facilities for the operation of passenger trains on lines and routes included in the basic system, over which no through passenger trains are being operated on October 30, 1970, including necessary track connections between lines on the same or different railroads;

(6) purchase or lease railroad rolling stock;

(7) develop and operate international intercity rail passenger service between points within the United States and points in Canada and Mexico, including Montreal, Canada; Vancouver, Canada; and Nuevo Laredo, Mexico (for purposes of section 564(b) of this title, such international rail passenger service is service included within the basic system); and

(8) to carry out other corporate purposes.

(f) Operational improvement program; comprehensive plan, submittal to President and Congress

The Corporation shall, not later than January 1, 1981, develop and submit to the Congress and to the President a comprehensive plan for the improvement of all intercity rail passenger service provided in the basic system. The Corpo-

ration shall commence implementation of such plan as soon as practicable after all or any portion thereof is developed. Such plan shall include—

(1) a zero-based assessment of all operating practices and implementation of changes to achieve the minimum use of employees consistent with safe operations and adequate service;

(2) a systematic program for optimizing the ratio of train size to passenger demand;

(3) a systematic program for trip time reduction on all trains in the basic system;

(4) establishment of training programs to achieve on-time departures and priorities for passenger trains over freight trains en route;

(5) adjustment of purchasing and pricing of food and beverages to achieve, as soon as practical after September 29, 1979, a continuing reduction in losses associated with food and beverage services with a goal of ultimate profitability;

(6) cooperative marketing opportunities between the Corporation and governmental entities at all levels having intercity rail passenger service; and

(7) cooperative marketing campaigns sponsored by the Corporation and the Department of Energy, the Federal Highway Administration and the Environmental Protection Agency.

(g) Maintenance, rehabilitation, repair and refurbishment of rail passenger equipment

The Corporation shall, not later than January 1, 1980, establish a Regional Maintenance Plan. Such plan shall include—

(1) a review panel at corporate headquarters consisting of such members as the President of the Corporation shall designate;

(2) a systemwide inventory of spare equipment parts by operational regions;

(3) establishment of the necessary number of maintenance employees per number of cars and locomotives per region;

(4) establishment of a systematic preventive maintenance program;

(5) a method for periodic evaluation of maintenance costs, time lags, and parts shortages with appropriate corrective actions; and

(6) such other elements or activities as the Corporation considers appropriate.

(h) Northeast Corridor project; completion and implementation; assistance by Corporation

The Corporation shall advise, consult and cooperate with, and, upon request, is authorized to assist in any other manner the Secretary, the United States Railway Association, the Corps of Engineers, and the Consolidated Rail Corporation in order to facilitate completion and implementation of the Northeast Corridor project, as defined in section 716(a)(3) of this title, by the earliest practicable date. The Secretary shall assign the highest priority to the completion of such project.

(i) Customs inspection and immigration procedures

The Secretary of the Treasury and the Attorney General shall (consistent with the effective enforcement of the immigration and customs laws) establish and maintain, in cooperation with the Corporation, en route customs inspection and immigration procedures aboard trains operated in international intercity rail passenger service, which procedures will

be convenient for passengers and will result in the most rapid possible transit in international intercity rail passenger service.

(j) Railroad police; employment by Corporation

The Corporation is authorized to employ railroad police for purposes of providing security and protection for rail passengers of the Corporation and for rail properties owned by the Corporation. Railroad police employed by the Corporation who have complied with the provisions of any State law setting forth licensing, residency, or related requirements applicable to railroad police or persons employed in similar positions may be employed without regard to the provisions of any other State's laws setting forth such requirements.

(k) Purchase of articles, materials and supplies mined, manufactured or produced in United States; exceptions

(1) Except as provided in paragraph (2) or (3) of this subsection, the Corporation shall purchase only—

(A) unmanufactured articles, materials, and supplies which have been mined or produced in the United States; and

(B) manufactured articles, materials, and supplies which have been manufactured in the United States substantially all from articles, materials, and supplies mined, produced, or manufactured, as the case may be, in the United States.

(2) The Secretary may, upon application of the Corporation, exempt the Corporation from the requirements of paragraph (1) of this subsection with respect to the purchase of particular articles, materials, or supplies, if the Secretary determines that—

(A) imposing such requirements with respect to such articles, materials, or supplies is inconsistent with the public interest;

(B) the cost of imposing such requirements with respect to such articles, materials, or supplies is unreasonable; or

(C) such articles, materials, or supplies or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(3) In addition to the exemptive authority set forth in paragraph (2), the Secretary may, upon application of the Corporation, exempt the Corporation from the requirements of paragraph (1) of this subsection with respect to the purchase of rolling stock or power train equipment if the Secretary determines that such rolling stock or power train equipment, as the case may be, cannot be purchased and delivered in the United States within a reasonable time.

(4) The provisions of this subsection shall not apply—

(A) in any case in which the cost of the articles, materials, or supplies purchased is less than $1,000,000; or

(B) in the case of articles, materials, or supplies purchased pursuant to a contract entered into before October 5, 1978.

(5) For purposes of this subsection, the terms "United States" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(l) Repealed. Pub. L. 99-272, title IV, § 4007(e)(1), Apr. 7, 1986, 100 Stat. 108

(m) Adequacy of service reports

For purposes of assessing the operational performance of trains, the President of the Corporation shall have the authority to direct the conductor on any Amtrak train to report to the Corporation any inadequacy of train operation. Adequacy of service reports required under this subsection shall be promptly transmitted to the Corporation. Each report shall be signed by the conductor and contain sufficient information to locate equipment or personnel failures.

(n) Food and beverage service; revenues

The Corporation shall implement policies which will eliminate the deficit in its on-board food and beverage operations no later than September 30, 1982. Beginning October 1, 1982, food and beverage services shall be provided on-board Amtrak trains only if the revenues from such service are equal to or greater than the total costs of such services as computed on an annual basis.

§§ 545a. Mail Service

The National Railroad Passenger Corporation shall utilize all feasible means, including taking into account the needs of the United States Postal Service in establishing schedules, to attract and service the bulk mail needs of the Postal Service.

§ 546. Laws applicable

(a) Corporation deemed common carrier subject to interstate commerce provisions; exceptions

The Corporation shall be deemed a common carrier by railroad within the meaning of section 10102 of title 49 and shall be subject to all provisions, including the provisions of sections 10721-10724 of title 49 other than those pertaining to—

(1) regulation of rates, fares, and charges;

(2) abandonment or extension of lines of railroads utilized solely for passenger service, and the abandonment or extension of operations over such lines of railroads, whether by trackage rights or otherwise;

(3) regulation of routes and service and the discontinuance or change of passenger train service operations; and

(4) the issuance of securities or the assumption of any obligation or liability with respect to the securities of others.

(b) Interstate commerce provisions relating to safety and employee relations

The Corporation shall be subject to the same laws and regulations with respect to safety and with respect to the representation of its employees for purposes of collective bargaining, the handling of disputes between carriers and their employees, employee retirement, annuity and unemployment systems, and other dealings with its employees as any other common carrier subject to subchapter I of chapter 105 of title 49.

(c) State or other laws relating to rates, routes, and service inapplicable

The Corporation shall not be subject to any State or other law pertaining to the transportation of passengers by railroad as it relates to rates, routes, or service.

(d) District of Columbia laws relating to leases and contracts

Leases and contracts entered into by the Corporation, regardless of the place where the same may be executed, shall be governed by the laws of the District of Columbia.

(e) Certain users and operators of facilities and equipment exempt from prohibitions of existing law

Persons contracting with the Corporation for the joint use or operation of such facilities and equipment as may be necessary for the provision of efficient and expeditious passenger service shall be and are hereby relieved from all prohibitions of existing law, including the antitrust laws of the United States, with respect to such contracts, agreements, or leases insofar as may be necessary to enable them to enter into such contracts and to perform their obligations thereunder.

(f) Travel by train; contract air program

All departments, agencies, and instrumentalities of the Federal Government shall, in authorizing travel in the continental United States for their employees or for members of the Armed Forces or commissioned services, treat travel by train (whether or not extra fare trains) on the same basis as travel by other authorized modes, which shall include allowing the Corporation to participate in the contract air program administered by the General Services Administration in markets where service provided by the Corporation is competitive as to rates and total trip times.

(g) Freedom of information provisions

The Corporation shall be subject to the provisions of section 552 of title 5.

(h) Auto-ferry service; pre-emption of State law

No common carrier by railroad may refuse to participate with the Corporation in providing auto-ferry service on the grounds that a State or local law or regulation makes the service unlawful; and neither the Corporation nor such railroad shall be subject to any fine, penalty, or other sanction for violation of a State or local law or regulation which has the

effect of prohibiting or impairing the provision of auto-ferry service.

(i) Communicable disease control requirements; applicability to intercity rail passenger service; disposal of human waste

The provisions of section 361 of the Public Health Service Act (42 U.S.C. 264) and other Federal, State and local laws shall not apply to waste disposal from railroad conveyances operated in intercity rail passenger service. New intercity rail passenger cars manufactured on or after October 15, 1990, shall be built to provide for the discharge of human wastes only at servicing facilities. The Corporation shall retrofit those of its intercity rail passenger cars that were manufactured after May 1, 1971 and before October 15, 1990, with human waste disposal systems that provide for the discharge of human wastes only at servicing facilities. Subject to the appropriation of funds, (1) such retrofit program shall be completed within not later than October 15, 1996, and (2) all cars that do not provide for the discharge of human wastes only at servicing facilities shall be removed from service after such date. The United States district courts shall have original jurisdiction over any civil actions brought by the Corporation to enforce the exemption conferred hereunder and may grant equitable or declaratory relief as requested by the Corporation.

(j) Intercity through routes and joint fares; cooperation between Corporation and other intercity common carriers of passengers

(1) The establishment of through routes and joint fares, between the National Railroad Passenger Corporation and other intercity common carriers of passengers by rail and motor carriers of passengers, is consistent with the public interest and the national transportation policy. The Congress encourages the making of such arrangements.

(2) The Corporation may establish through routes and joint fares with any any[4] domestic or international motor, air, or water carrier.

(k) Repealed. Pub. L. 99-272, title IV, § 4007(b), Apr. 7, 1986, 100 Stat. 108

(l) State or local laws relating to pay periods or pay days inapplicable; frequency of payments

The Corporation shall not be subject to any State or local law relating to pay periods or days for payment of employees. No employee of the Corporation shall be paid less frequently than such employee is paid as of October 1, 1979, other than pursuant to an applicable collective bargaining agreement.

(m) Business activity and qualification; District of Columbia as principal office and place of business for process and citizenship for original Federal jurisdiction

The Corporation shall be deemed to be qualified to do business in each State in which it performs any activity authorized under this chapter. In connection with the performance of such activities, the Corporation shall accept service of process addressed by certified mail to the secretary of the Corporation at its principal office and place of business in Washington, District of Columbia. The Corporation shall be deemed to be a citizen only of the District of Columbia for the purpose of determining the original jurisdiction of the district courts of the United States in civil actions to which the Corporation is party.

(n) Additional Taxes

(1) The Corporation shall not be required to pay any additional taxes as a consequence of its expenditure of funds to acquire or improve real property, equipment, facilities, or

[4] So in original.

right-of-way materials or structures used directly or indirectly in the provision of rail passenger service. For purposes of this subsection, "additional taxes" means taxes or fees (A) on the acquisition, improvement, ownership, or operation of personal property by the Corporation; and (B) on real property other than taxes or fees on the acquisition of real property, or on the value of real property which is not attributable to improvements made, or the operation of such improvements, by the Corporation.

(2) For purposes of this subsection, the term "Corporation" includes the Corporation's railroad subsidiaries and any lessors and lessees of the Corporation or its railroad subsidiaries.

§ 546b. Exemption from taxes or other fees imposed by any state, political subdivision, or local taxing authority levied on the Corporation or any railroad subsidiary; covered period; jurisdiction to enforce exemption

Notwithstanding any other provision of law, the National Railroad Passenger Corporation ("the Corporation") shall be exempt from any taxes or other fees imposed by any state, political subdivision of a state, or local taxing authority which are levied on the Corporation, or any railroad subsidiary thereof, from and after October 1, 1981, including such taxes and fees levied after September 30, 1982: provided, however, That notwithstanding any provision of law, the Corporation shall not be exempt from any taxes or other fees which it is authorized to pay as of September 10, 1982. Taxes and Fees levied on the Corporation or any railroad subsidiary thereof by States, political subdivisions of States, or local taxing authorities with respect to periods beginning prior to October 1, 1981, shall be payable in proportion to the part of the relevant tax period which elapsed prior to such date. Notwithstanding the provision of section 1341 of title 28, the United States district courts shall have original jurisdiction over any

civil actions brought by the Corporation to enforce the exemption conferred hereunder and may grant equitable or declaratory relief as requested by the Corporation.

§ 547. Jurisdiction of the district courts of the United States to impose sanctions

(a) If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilities under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat. Any discontinuance of routes, trains or services or reduction in frequency of service, which is made by the Corporation shall not be reviewable in any court except on petition of the Attorney General of the United States.

(b) Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this chapter.

§ 548. Reports to the President and the Congress

(a) Intercity passenger service

The Corporation shall submit to the Congress a report not later than February 15 of each year. The report shall include, for each route on which the Corporation operated intercity rail passenger service during the preceding fiscal year, data on

ridership, passenger miles, short-term avoidable profit or loss per passenger mile, revenue-to-cost ratio, revenues, the Federal subsidy, the non-Federal subsidy, and on-time performance. Such report shall also provide all relevant information concerning any decision to pay to any officer of the Corporation compensation at a rate in excess of that prescribed for level I of the Executive Schedule under section 5312 of title 5, specify significant operational problems which have been identified by the Corporation, together with proposals by the Corporation to resolve such problems.

(b) Annual report

The Corporation shall transmit to the President and to the Congress by February 15 of each year (beginning with 1973), and at such other times as it deems desirable, a comprehensive and detailed report of its operations, activities, and accomplishments under this chapter, including a statement of receipts and expenditures for the preceding fiscal year. At the time of its annual report, the Corporation shall submit such legislative recommendations as it deems desirable, including the amount of financial assistance needed for operations and for capital improvements, the manner and form in which the amount of such assistance should be computed, and the sources from which such assistance should be derived.

(c) Balanced national transportation system

The Secretary shall transmit to the President and to the Congress by March 15 of each year (beginning with 1974) a report on the effectiveness of this chapter in meeting the requirements for a balanced national transportation system, together with any legislative recommendations. Beginning in 1976, the Secretary's report on the Corporation shall be made part of the Department of Transportation annual report to the Congress.

SUBCHAPTER IV—PROVISION OF RAIL PASSENGER SERVICES

§ 561. Assumption of intercity rail passenger service by Corporation.

(a) Contracts; passenger deficit payments; determination of the amount, referral to the Interstate Commerce Commission; payment schedule

(1) On or before May 1, 1971, the Corporation is authorized to contract and, upon written request therefor from a railroad, shall tender a contract to relieve the railroad, from and after May 1, 1971, of its entire responsibility for the provision of intercity rail passenger service. On or after March 1, 1973, but before January 1, 1975, the Corporation is authorized to contract, and upon written request therefor, shall tender a contract to relieve the railroad of its entire responsibility for the provision of intercity rail passenger service and such relief shall become effective upon the date on which such contract is entered into. Contracts may be entered into on or before May 1, 1971, notwithstanding the fact that the decision of the Commission under section 502(4) of this title with respect to avoidable loss has not become final. Any contract entered into before such decision of the Commission has become final shall be subject to adjustment to assure that the contract is consistent with such final decision of the Commission. The contract may be made upon such terms and conditions as necessary to permit the Corporation to undertake passenger service on a timely basis. Upon its entering into a valid contract (including protective arrangements for employees), the railroad shall be relieved of all its responsibilities as a common carrier of passengers by rail in intercity rail passenger service under subtitle IV of title 49 or any State or other law relating to the provision of intercity passenger service: *Provided*, That any railroad discontinuing a train hereunder must give notice in accordance with the notice procedures contained in section 10908 of title 49.

(2) In consideration of being relieved of this responsibility by the Corporation, the railroad shall agree to pay to the Corporation each year for three years an amount equal to one-third of 50 per centum of the fully distributed passenger service deficit of the railroad as reported to the Commission for the year ending December 31, 1969. The payment to the Corporation may be made in cash or, at the option of the Corporation, by the transfer of rail passenger equipment or the provision of future service as requested by the Corporation. Unless the railroad waives all rights to receive stock in exchange for its payments, the railroad shall receive common stock from the Corporation in an amount equivalent in par value to each payment.

(3) In agreeing to pay the amount specified in paragraph (2) of this subsection, a railroad may reserve the right to pay a lesser sum to be determined by calculating either of the following:

(A) 100 per centum of the avoidable loss of all intercity rail passenger service operated by the railroad during the period January 1, 1969, through December 31, 1969; or

(B) 200 per centum of the avoidable loss of the intercity rail passenger service operated by the railroad during the period January 1, 1969, through December 31, 1969, covering all intercity service over the routes between those points between which the Secretary, under sections 521 and 522 of this title, has specified that intercity passenger trains shall be operated within the basic system.

If the amount owed the Corporation under either of these alternatives is agreed by the parties to be less than the amount paid pursuant to paragraph (2), the Corporation shall pay the difference to the railroad and the railroad shall surrender to the Corporation an amount of stock, at par value, equivalent to such payment. If the railroad and the Corporation are

unable to agree as to the amount owed, the matter shall be referred to the Interstate Commerce Commission for decision. The Commission, upon investigation, shall decide the issue within ninety days following the date of referral, or within such additional time as the Commission may order not to exceed an aggregate of one hundred and eighty days following such date of referral, and its decision shall be binding on both parties.

(4) The payments to the Corporation shall be made in accordance with a schedule to be agreed upon between the parties. Unless the parties otherwise agree, the payments for each of the first twelve months following the date on which the Corporation assumes any of the operational responsibilities of the railroad shall be in cash and not less than one thirty-sixth of the amount owed.

(b) Commencement of operations

On May 1, 1971, the Corporation shall begin the provision of intercity rail passenger service between points within the basic system unless such service is being provided (i) either by a railroad with which it has not entered into a contract under subsection (a) of this section or (ii) by a regional transportation agency, provided such agency gives satisfactory assurance to the Corporation of the agency's financial and operating capability to provide such service, and of its willingness to cooperate with the Corporation and with other regional transportation agencies on matters of through train service, through car service, and connecting train service. The Corporation may at any time subsequent to May 1, 1971, contract with a regional transportation agency to provide intercity rail passenger service between points within the basic system included within the service of such agency.

(c) Others prohibited from conducting intercity rail passenger service

Except as provided in section 545(b) of this title concerning auto-ferry service, no railroad or any other person may, without the consent of the Corporation, conduct intercity rail passenger service over any route over which the Corporation is performing scheduled intercity rail passenger service pursuant to a contract under this section.

§ 562. Facilities and service agreements

(a) Contracts with railroads or regional transportation agencies; authority of Interstate Commerce Commission; fixing of compensation; agreements with State, local or regional transportation agencies; disagreement procedures; criteria for compensation

(1) The Corporation may contract with railroads or with regional transportation agencies for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree, which terms shall include a penalty for untimely performance. In the event of a failure to agree, the Interstate Commerce Commission shall, within ninety days after application by the Corporation, if it finds that doing so is necessary to carry out the purposes of this chapter, order the provision of services or the use of tracks or facilities of the railroad by the Corporation, on such terms and for such compensation as the Commission may fix as just and reasonable, and the rights of the Corporation to such services or to the use of tracks or facilities of the railroad or agency under such order or under an order issued under subsection (b) of this section shall be conditioned upon payment by the Corporation of the compensation fixed by the Commission. In fixing just and reasonable compensation for the provision of services or for the use of tracks and facilities ordered by the Commission under the preceding sentence, the Commission shall, in fixing compensation in excess of incremental costs, consider quality of service as a major factor in

determining the amount (if any) of such compensation. If the amount of compensation fixed is not duly and promptly paid, the railroad or agency entitled thereto may bring an action against the Corporation to recover the amount properly owed. (2) Notwithstanding any other provision of this chapter, the Corporation may enter into agreements with any other railroads and with any State (or local or regional transportation agency) responsible for providing commuter rail or rail freight services over tracks, rights-of-ways, and other facilities acquired by the Corporation pursuant to authority granted by the Regional Rail Reorganization Act of 1973 [45 U.S.C. 701 et seq.] and the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. 801 et seq.]. In the event of a failure to agree, the Commission shall order that rail services continue to be provided, and it shall, consistent with equitable and fair compensation principles, decide, within 120 days after the date of submission of a dispute to the Commission, the proper amount of compensation for the provision of such services. The Commission, in making such a determination, shall not permit cross subsidization between intercity rail passenger service and rail freight services. The Commission, in making such a determination, shall assign to a freight railroad obtaining services pursuant to this paragraph the costs incurred by the Corporation solely for the benefit of that railroad, plus a proportionate share of all other costs of providing services covered by this paragraph that are incurred for the common benefit of the Corporation and such freight railroad. The proportionate share of such other costs assigned to a freight railroad shall be based on relative measures of volume of car operations, tonnage, or other factors that reasonably reflect the relative use of the rail properties covered by this paragraph. Nothing in this paragraph shall be construed to preclude parties from entering into an agreement under this paragraph either before or after a determination of the Commission under this paragraph.

(b) Immediate availability of tracks and other facilities

To facilitate the initiation of operations by the Corporation within the basic system, the Commission shall, upon application by the Corporation, require a railroad to make immediately available tracks and other facilities. The Commission shall thereafter promptly proceed to fix such terms and conditions as are just and reasonable.

(c) Emergency measures

To facilitate such operations by the Corporation as may be deemed by it to be necessary in an emergency, the Commission shall, upon application by the Corporation, require a railroad to make immediately available tracks and other facilities for the duration of such emergency. The Commission shall thereafter promptly proceed to fix such terms and conditions as are just and reasonable including indemnification of the railroad by the Corporation against any casualty risk to which it may be exposed.

(d) Disagreement procedures

(1) If the Corporation and a railroad are unable to agree upon terms for the sale to the Corporation of property (including interests in property) owned by the railroad and required for intercity rail passenger service, the Corporation may apply to the Commission for an order establishing the need of the Corporation for the property at issue and requiring the conveyance thereof from the railroad to the Corporation on reasonable terms and conditions, including just compensation. Unless the Commission finds that—

(A) conveyance of the property to the Corporation would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and

(B) the obligations of the Corporation to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition of alternative prop-

erty (including interests in property) which is available for sale on reasonable terms to the Corporation, or available to the Corporation by the exercise of its authority under section 545(d) of this title,

the need of the Corporation for the property shall be deemed to be established and the Commission shall order the conveyance of the property to the Corporation on such reasonable terms and conditions as it may prescribe, including just compensation. The Corporation may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of this chapter.

(2) The Commission shall expedite proceedings under this subsection and, in any event, issue its order within one hundred and twenty days from receipt of the application from the Corporation. If just compensation has not been determined on the date of the order, the order shall require, as part of just compensation, interest at the rate of 6 per centum per annum from the date prescribed for conveyance until just compensation is paid.

(e) Preferences for intercity or commuter passenger trains

(1) Except in an emergency, intercity or commuter passenger trains operated by or on behalf of the Corporation shall be accorded preference over freight trains in the use of any given line of track, junction, or crossing, unless the Secretary has issued an order to the contrary in accordance with paragraph (2) of this subsection.

(2) Any railroad whose rights with regard to freight train operation are affected by paragraph (1) of this subsection may file an application with the Secretary requesting appropriate relief. If, after hearing under section 553 of title 5, the Secretary finds that adherence to such paragraph (1) will materially lessen the quality of freight service provided to

shippers, the Secretary shall issue an order fixing rights of trains, on such terms and conditions as are just and reasonable.

(f) Accelerated speeds

If, upon request of the Corporation, a railroad refuses to permit accelerated speeds by trains operated by or on behalf of the Corporation, the Corporation may apply to the Secretary for an order requiring the railroad to permit such accelerated speeds. The Secretary shall make findings as to whether such accelerated speeds are unsafe or otherwise impracticable, and with respect to the nature and extent of improvements to track, signal systems, and other facilities that would be required to make such accelerated speeds safe and practicable. After hearing, the Secretary shall issue an order fixing maximum permissible speeds of Corporation trains, on such terms and conditions as he shall find to be just and reasonable.

(g) Operation of additional trains

Upon receipt of an application from the Corporation in any situation where the Corporation is unable to obtain a satisfactory, voluntary agreement from a rail carrier for operation of additional trains on the rail lines of that rail carrier, the Secretary may, after a hearing on the record, order such rail carrier, within 60 days, to permit or provide requested operation of trains of the Corporation over such rail lines on schedules based upon legally permissible operating times. If the Secretary determines not to hold a hearing, the Secretary, within 30 days after receipt of an application from the Corporation, shall publish in the Federal Register his reasons for not holding a hearing. Any such hearing must include a consideration of whether such an order would unduly impair freight operations of the rail carrier involved, and the burden shall be on the rail carrier seeking to oppose the operation of an additional train to demonstrate that the requested operation

will impair freight operations. In establishing such scheduled running times, the Secretary shall give proper consideration to the statutory goal that the Corporation shall implement schedules which will attain a system-wide average speed of at least 55 miles per hour which can be adhered to with a high degree of reliability and passenger comfort. The compensation payable by the Corporation to a rail carrier for an operation ordered pursuant to this subsection shall be that which is properly established pursuant to an agreement between the Corporation and such rail carrier, or, in the absence of an applicable agreement, shall be determined by the Commission in a proceeding pursuant to subsection (a) of this section.

§ 563. State supported services

(a) Route additions

Except as otherwise provided in this chapter, after October 1, 1981, all route additions shall be in accordance with the Route and Service Criteria.

(b) Application for institution or retention of services; contents; review; agreement of Corporation with State; financing; fare increases

(1)(A) Any State or group of States, any regional or local agency, or any other person may submit an application to the Corporation requesting the institution of rail passenger service or the retention of a route, train, or service, or some portion of such route, train, or service, which the Corporation intends to discontinue under section 564 of this Act.

(B) Each application by a State, agency, or person for rail passenger service under this subsection shall contain—

(i) adequate assurances by such State, agency, or person that it has sufficient resources to meet it share of the cost of such service for the period such service is to be provided;

(ii) a market analysis acceptable to the Corporation to ensure that there is adequate demand to warrant such service; and

(iii) a statement by such State, agency, or person that it agrees to pay in each year of operation of such service at least—

(I) 45 percent in the first year of operation; and

(II) 65 percent in each year of operation thereafter;

of the short-term avoidable losses of operating such service and, except as provided in section 601(a) of this title, 50 percent of the associated capital costs.

(2)(A) The Corporation shall review each application submitted by a State, agency, or person for the institution or retention of service under this subsection to determine whether—

(i) the application complies with the requirements of paragraph (1)(B) of this subsection; and

(ii) there is a reasonable probability that the service requested can be provided with the resources available to the Corporation.

(B) Any application submitted by a group of States shall be considered in the same manner as an application submitted by a single State, and not on the basis of whether each State that is a party to such application meets the requirements of paragraph (1)(B) of this subsection.

(3)(A) The Corporation may enter into an agreement with such State, agency, or person for the institution or retention of such service, in accordance with the funding formula set forth in paragraph (1)(B) of the subsection, if the Corporation determines that such service can be provided with resources available to the Corporation.

(B) An agreement entered into pursuant to this subsection may by mutual agreement be renewed for one or more additional terms of not more than 2 years.

(C) If more than one application is made for service and all applications are consistent with the requirements of this subsection, but all the services applied for cannot be provided with the available resources of the Corporation, the board of directors shall decide in its discretion which application or applications best serve the public interest and can be provided with the available resources of the Corporation.

(4)(A) Any funds provided by the Corporation under an agreement with a State, an agency or a person pursuant to this subsection which are allocated for associated capital costs and which are not expended during the fiscal year for which they are provided shall remain available until expended.

(B) The board of directors shall, after consultation with the appropriate officials of each State that contributes to the operation of service under this subsection, establish the basis for determining the short-term avoidable loss and associated capital costs of service operated under this subsection and the total revenues from such service. In addition, the Corporation shall provide appropriate State officials with the basis for determining such loss, costs, and revenues for each route on which service is operated under this subsection.

(5)(A) Prior to instituting any fare increase that applies to service provided under this subsection and that represents an increase of more than 5 percent over a 6-month period, the Corporation shall consult with and obtain the views of the appropriate officials of each State to be affected by such fare increase. The Corporation shall provide the officials of each such State with an explanation of the circumstances warranting the proposed fare increase (such as the unique costs of or demand for the services involved).

(B) A proposed fare increase described in subparagraph (A) shall take effect 90 days after the date the Corporation

first consults with the affected States pursuant to such subparagraph. Within thirty days of the initial consultation, the affected State may submit proposals to the Corporation for reducing costs and increasing revenues in connection with service provided under this subsection. Following such thirty-day period, the Corporation, after taking into consideration such proposals as may be submitted by a State, shall decide whether to implement the proposed fare increase in whole or in part.

(C) Notwithstanding the provision of subparagraph (B) of this paragraph, the Corporation may increase fares pursuant to this paragraph during the first month of a fiscal year if the authorization for appropriations or the appropriations for the benefit of the Corporation for such fiscal year are not enacted at least 90 days prior to the beginning of such fiscal year, and the Corporation may increase fares pursuant to this paragraph during the 30 days following enactment of any appropriation for the benefit of the Corporation or rescission thereof. Notice of fare increases pursuant to the preceding sentence shall be given by the Corporation to any affected State as soon as possible following the decision to effect such fare increase.

(6) At least 2 but not more than 5 percent of all revenues generated by each particular route operated under the authority of this subsection shall be dedicated to advertising and promotion of such service on a local level.

(c) Repealed. Pub. L. 96-73, title I, § 115(c), Sept. 29, 1979, 93 Stat. 544

(d) Continuance of service; funding

Beginning October 1, 1981, the Corporation shall continue to operate rail passenger service operated under this subsection prior to October 1, 1981, if such service meets the criterion set forth in section 564(d)(2) of this title, after taking into account projected fare increases and any State or local contributions to such service. Beginning October 1, 1986, if

such service is not projected to meet such criterion, the Corporation may discontinue, modify, or adjust such service so that the applicable criterion will be met. Any service continued under this subsection shall be funded in accordance with the method of funding in effect on the day prior to October 1, 1981. Notwithstanding the second sentence of this subsection, on any date between October 1, 1993, and September 30, 1995, if the service operated pursuant to this paragraph on a route during the previous 6-month period has a short-term avoidable loss, the Corporation may elect to consider discontinuance, modification, or adjustment of such service. If such election is made, the Corporation shall solicit public comment on alternatives to discontinuance, modification, or adjustment of such service. The public comment period shall be at least 30 days. Within 60 days after the expiration of that comment period, the Corporation may discontinue, modify, or adjust such service so that there is no short-term avoidable loss for operation of service pursuant to this subsection on the route. For purposes of this paragraph the calculation of short-term avoidable loss shall not include the cost of providing passenger equipment required to operate such service.

§ 564. Addition to or discontinuance of routes and services

(a) Discontinuance of service

Unless it has entered into a contract with the Corporation pursuant to section 561(a)(1) of this title, no railroad may discontinue any intercity passenger train whatsoever prior to January 1, 1975, the provisions of any other Act, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, a Federal or State court, agency, or authority to the contrary notwithstanding. On and after January 1, 1975, passenger train service operated by such railroad may be discontinued under the provisions of sections 10908 and 10909 of title 49. Upon filing of a notice of discontinuance by such railroad, the Corporation may

undertake to initiate passenger train operations between the points served.

(b) Route and Service Criteria for route discontinuances

After October 1, 1979, all route discontinuances by the Corporation shall be in accordance with the Route and Service Criteria.

(c) Development of specific proposals; operation within available resources; review of routes; reduction of costs; notice of service discontinuance

(1) Within 120 days after May 26, 1975, the board of directors of the Corporation shall study, develop, and submit to the Secretary, to the Commission, and to the Congress an initial proposal setting forth criteria and procedures under which the Corporation would be authorized to add or discontinue routes and services. Such criteria and procedures shall include, but need not be limited to—

(A) methods for evaluating the economic and environmental impact of any addition or discontinuance of intercity rail passenger service including an evaluation of the economic impact to the Corporation and to the nation of the addition of new service points along existing or new intercity routes within the Northeast Corridor;

(B) methods for evaluating the effects of any such addition or discontinuance on connecting parts of the national system of intercity rail passenger service;

(C) methods for estimating, with respect to any such addition or discontinuance, the population to be affected, the demand for intercity rail passenger service, the revenue per passenger mile, and the effect on capital costs and revenue of the Corporation;

(D) methods for evaluating the availability of alternative modes of transportation;

(E) methods for giving public notice of, and obtaining public comments on, any such addition or discontinuance; and

(F) methods for establishing a priority ranking system for routes and trains to meet the needs of the public convenience and necessity for a balance transportation system, taking into consideration the criteria and procedures referred to in subparagraphs (A) through (E) of this paragraph, together with such other criteria as the board of directors deems appropriate.

(2) Within 150 days after May 26, 1975, the Secretary and the Commission shall submit to the Congress and to the board of directors of the Corporation their comments on the initial proposal setting forth criteria and procedures developed by the board of directors of the Corporation, together with such recommendations as they may deem appropriate.

(3)(A) Within 30 days after receipts of comments submitted by the Secretary and the Commission under paragraph (2) of this subsection, the board of directors of the Corporation shall consider such comments and shall submit to the Congress a final proposal setting forth criteria and procedures under which the Corporation would be authorized to add or discontinue routes and services within the national system of intercity rail passenger service. The criteria and procedures set forth in such final proposal shall take effect at the end of the first period of 60 calendar days of continuous session of the Congress after the date of its submission, unless either the Senate or the House of Representatives adopts a resolution during such period stating that it does not approve such final proposal. If no resolution is adopted as provided in the preceding sentence, the Corporation may add or discontinue routes and services in accordance with the criteria and procedures set forth in the final proposal, notwithstanding the provisions of sections 10908 and 10909 of title 49 or of subsection (b)(3) of this section, relating to discontinuance of

service within the basic system. Service beyond the basic system referred to in subsection (b)(2) of this section shall not be discontinued under this subsection until March 1, 1977. For purposes of this paragraph, continuity of session of the Congress is broken only by an adjournment sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded from the computation of the 60-day period.

(B) Beginning on October 1, 1981, if the Corporation determines that an amendment to the Route and Service Criteria is necessary or appropriate, it shall submit a draft of such amendment to the Congress. Such amendment shall take effect at the end of the first period of 120 calendar days of continuous session of the Congress after the date of its submission, unless the Senate and the House of Representatives adopt a joint resolution during such period stating that they do not approve such amendment. For purposes of this subparagraph, continuity of session of the Congress is broken only by an adjournment sine die and the days on which either House is not in session because of adjournment of more than 3 days to a day certain are excluded in the computation of such 120-day period.

(4)(A) The Corporation's annual total costs shall not exceed the funds, including grants made under section 601 of this title, contributions provided by States, regional and local agencies and other persons, and revenues, available to the Corporation within the then-current fiscal year. Commencing in fiscal year 1982, the Corporation shall recover an amount sufficient that the ratio of its revenues, including contributions from States, agencies, and other persons, to costs, excluding capital costs, shall be at least 50 percent. Commencing in fiscal year 1986, the Corporation shall set a goal of recovering an amount sufficient that the ratio of its revenues, including contributions from States, agencies, and other persons, to costs, excluding capital costs, shall be at least 61 percent.

(B) The Corporation shall conduct an annual review of each route in the basic system to determine if such route is projected to meet the criterion appropriate to such route set forth in subsection (d) of this section, as adjusted to reflect constant 1979 dollars. If the Corporation determines on the basis of such review that such route will not meet such criterion, the Corporation shall discontinue, modify, or adjust the operation of rail passenger service over such route so that the criterion will be met.

(C) The annual review conducted by the Corporation under subparagraph (B) shall include an evaluation of the potential market demand for, and the cost of providing service on routes or portions thereof, and the potential market demand for, and cost of providing service on, alternative routings. The Corporation shall transmit the results of the annual review to each House of the Congress and to the Secretary of Transportation.

(D)(i) No later than 30 days after the beginning of each fiscal year, the Corporation shall evaluate the financial requirements for operating the basic system and its progress in achieving the system-wide performance standards prescribed in this chapter during such fiscal year. If the Corporation determines that the funds to be available for such fiscal year are insufficient to meet the projected operating costs, or if the Corporation projects that the system cannot meet the performance standards of this chapter, the Corporation shall, in accordance with this subparagraph, take such action as may be necessary to reduce such costs and improve performance.

(ii) Any action taken by the Corporation to reduce costs or improve performance pursuant to this subparagraph shall be designed to continue the maximum level of service practicable, and may include—

(I) changes in frequency of service;

(II) increases in fares;

(III) reductions in the costs of sleeper car service on certain routes;

(IV) reductions in the costs of dining car service on certain routes;

(V) increases in the passenger capacity of cars used on certain routes; and

(VI) restructuring or adjustment of the route system or discontinuance of service over routes, considering short-term avoidable loss and the number of passengers served by trains on such routes.

(E) The Corporation shall, prior to October 1, 1983, reduce its costs of management by not less than 10 percent of the administrative costs incurred during the period of twelve calendar months prior to June 1, 1981.

(F)(i) Notice of any discontinuance of service pursuant to this paragraph or section 563(b) of this title shall be posted at least 14 days before such discontinuance in all stations served by the train to be discontinued.

(ii) Notice of any discontinuance of service pursuant to this paragraph or section 563(b) of this title shall be given in such a manner as the Corporation determines will afford an opportunity for any State or group of States, or any regional or local agency or other person, to agree to share the cost of such route, train, or service, or some portion of such route, train, or service. Such notice shall be given at least 90 days prior to such discontinuance.

(iii) Notwithstanding the provisions of clause (ii), the Corporation may discontinue service pursuant to this paragraph or section 563(b) of this title during the first month of a fiscal year if the authorization for appropriations or the appropriations for the benefit of the Corporation for such fiscal year are not enacted at least 90 days prior to the beginning of such fiscal year, and the Corporation may discontinue service

pursuant to this paragraph or section 563(b) of this title during the 30 days following enactment of any appropriation for the benefit of the Corporation or rescission thereof. Notice of discontinuance of service pursuant to the preceding sentence shall be given by the Corporation to any affected State or regional or local transportation authority as soon as possible following the decision to effect such discontinuance.

(5) The Route and Service Criteria shall not apply to—

(A) decisions of the Corporation to increase or, where construction schedules, other temporary disruptive factors, or seasonal fluctuations in ridership so warrant, to decrease frequency of service on existing routes or portions of existing routes or on routes where an additional frequency of service is being tested;

(B) rerouting of service between major population centers on existing routes;

(C) modification or adjustment of service under paragraph (4)(B) of this subsection, and discontinuance, modification, or adjustment under paragraph (4)(D) of this subsection.

(d) Long distance and short distance route operations dependent on short term avoidable loss; factors; calculations; report to Congressional committees

(1) Where reductions in operating expenses can be obtained, the Corporation shall operate rail passenger service over any long distance route which is recommended for discontinuance by the Secretary pursuant to section 4 of the Amtrak Improvement Act of 1978, with or without any restructuring of such route to serve major population centers as end points or principal intermediate points, in order to maintain a national intercity rail passenger system, if the short term avoidable loss per passenger mile on such route, as calculated by the Corporation and projected for the fiscal year ending September 30, 1980, is not more than 7 cents per pas-

senger mile. Short term avoidable loss per passenger mile calculated by the Corporation for purposes of this subsection shall be based upon consistently denied factors for all types of routes, and such short term avoidable loss shall be calculated in the same manner for all routes. The Corporation shall make its calculations under this subsection on the basis of the most recent available statistics for a 90-day period, except that the Corporation may also utilize historical data (such as seasonal fluctuations in ridership) as long as such data is adjusted to reflect the most recent available statistics.

(2) Where reductions in operating expenses can be obtained, the Corporation shall operate rail passenger service over any short-distance route which is recommended for discontinuance by the Secretary pursuant to section 4 of the Amtrak Improvement Act of 1978 with or without any restructuring of such route to serve major population centers as end-points or principal intermediate points, in order to maintain a national intercity rail passenger system, if the short-term avoidable loss per passenger mile on such route, as calculated by the Corporation and projected for the fiscal year ending September 30, 1980, is not more than 9 cents per passenger mile.

(e) Repealed. Pub. L. 97-35, title XI, § 1183(d), Aug. 13, 1981, 95 Stat. 697

(f) Saint Petersburg (Tampa) on the Amtrak Route System

For the purpose of this section and section 4 of the Amtrak Improvement Act of 1978, the reference to Tampa in table 4-1 at page 4-7 of the Secretary's Final Report to Congress on the Amtrak Route System, dated January 1979, shall be deemed to mean Saint Petersburg.

(g) Short-haul train demonstration of major metropolitan area linkage operations

Notwithstanding any other provisions of this chapter (including the requirements of section 563(d) of this title), the Corporation is authorized, to the extent available resources permit, to operate short-haul trains, on a demonstration basis for the purpose of determining the feasibility and benefits of such services, on additional routes of 200 miles or less which link two or more major metropolitan areas.

§ 565. Protective arrangements for employees

(a) Duty of railroads; discontinuance of intercity rail passenger service

A Railroad shall provide fair and equitable arrangements to protect the interests of employees, including employees of terminal companies, affected by a discontinuance of intercity rail passenger service whether occurring before, on, or after January 1, 1975. A "discontinuance of intercity rail passenger service" shall include any discontinuance of service performed by railroad under any facility or service agreement under sections 545 and 562 of this title pursuant to any modification or termination thereof or an assumption of operations by the Corporation. For purposes of subsection (c) of this section and any agreement designed to implement the provisions of such subsection, a "discontinuance of intercity rail passenger service" shall not include any adjustment in frequency or seasonal suspension of intercity rail passenger trains the effect of which is a temporary suspension of service unless such adjustment or suspension causes a reduction of passenger train operations on a particular route to a frequency of less than three round trips per week at any time during any calendar year.

(b) Substantive requirements for protection

Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 11347 of title 49. Any contract entered into pursuant to the provisions of this subchapter shall specify the terms and conditions of such protective arrangements. No contract under section 561(a)(1) of this title between a railroad and the Corporation may be made unless the Secretary of Labor has certified to the Corporation that the labor protective provisions of such contract afford affected employees, including affected terminal employees, fair and equitable protection by the railroad.

(c) Commencement of protection

Upon commencement of operations in the basic system, the substantive requirements of subsections (a) and (b) of this section shall apply to the Corporation and its employees in order to insure the maintenance of the protective arrangements specified in such subsections, except that nothing in this subsection shall be construed to impose upon the Corporation any obligation of a railroad with respect to any right, privilege, or benefit earned by any employee as a result of prior service performed for such railroad. The Secretary of Labor shall certify that affected employees of the Corporation have been provided fair and equitable protection as required

by this section within one hundred and eighty days after assumption of operations by the Corporation.

(d) Obligations of contractors; minimum wages; labor, health, and safety standards

The Corporation shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors and sub-contractors in the performance of construction work financed with the assistance of funds received under any contract or agreement entered into under this title [this subchapter] shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act [40 U.S.C. 276a et. seq.]. The Corporation shall not enter into any such contract or agreement without first obtaining adequate assurance that required labor standards will be maintained on the construction work. Health and safety standards promulgated by the Secretary of Labor pursuant to section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333) shall be applicable to all construction work performed under such contracts or agreements, except any construction work performed by a railroad employee. Wage rates provided for in collective bargaining agreements negotiated under and pursuant to the Railway Labor Act [45 U.S.C. 151 et seq.] shall be considered as being in compliance with the Davis-Bacon Act.

(e) Contracts not to result in layoff

(1) Except as provided in paragraph (2) of this subsection, the Corporation shall not contract out any work normally performed by employees in any bargaining unit covered by a contract between the Corporation or any railroad providing intercity rail passenger service on October 30, 1970, and any labor organization, if such contracting out shall result in the layoff of any employee or employees in such bargaining unit.

(2) The provisions of this subsection shall not apply to food and beverage services provided on-board Amtrak trains.

(f) Free or reduced-rate transportation for railroad employees; single systemwide schedule of terms and compensation; reimbursement of Corporation by railroads; retroactive relief after October 1, 1981; "railroad employee" defined.

The Corporation shall take such action as may be necessary to assure that, to the maximum extent practicable, any railroad employee eligible to receive free or reduced-rate transportation by railroad on April 30, 1971, under the terms of any policy or agreement in effect on such date will be eligible to receive, provided space is available, free or reduced-rate transportation on any intercity rail passenger services provided by the Corporation under this chapter, on terms similar to those available on such date to such railroad employee under such policy or agreement. However, the Corporation may apply to all railroad employees eligible to receive free or reduced-rate transportation under such policies or agreements, a single systemwide schedule of terms determined by the Corporation to reflect terms applicable to the majority of such employees under those policies or agreements in effect on April 30, 1971. Unless the Corporation and a railroad or group of railroads agree on a different basis for compensation, the Corporation shall be reimbursed by each railroad at the rate of 25 percent of the systemwide average monthly yield per revenue passenger mile. Reimbursement at this rate is in lieu of any charges for liability incident to travel of railroad employees eligible for free or reduced-rate transportation and any other costs incurred by the Corporation in connection with free or reduced-rate transportation and any other costs incurred by the Corporation in connection with free or reduced-rate transportation. Nothing in this subsection shall preclude the Commission from ordering retroactive relief in any proceeding instituted or reopened after October 1, 1981. As used in this subsection, the term "railroad employee"

means (1) an active full-time employee, including any such employee during a period of furlough or while on leave of absence, of a railroad or terminal company, (2) a retired employee of a railroad or terminal company, and (3) the dependents of any employee referred to in clause (1) or (2) of this sentence.

(g) Amtrak commuter exception

The provisions of subsections (a), (b), and (c) of this section shall not apply to Amtrak commuter.

§ 566. Retention and maintenance of facilities

(a) Necessity of approval by Secretary for downgrading or disposal of facilities

No facilities of a railroad (including a regional transportation agency) which are used in the operation of rail passenger services by the Corporation on February 1, 1979, shall be downgraded or disposed of without obtaining the prior approval of the Secretary under this section.

(b) Notification; agreement of Corporation and railroad; applications for approval by Secretary

Whenever any railroad intends to downgrade or dispose of a facility referred to in subsection (a) of this section which is not currently being used in the operation of services by the Corporation, such railroad shall first notify the Corporation of its intention to take such action. If, within 60 days after receipt by the Corporation of such notice, the Corporation and such railroad are not able to enter into an agreement for the retention or maintenance of such facility or for the convenience to the Corporation of such facility or an interest therein, the railroad may apply to the Secretary for approval of the downgrading or disposal of the facility.

(c) Approval of applications; objections to approval; payment of avoidable costs

(1) If the Corporation does not object to an application of a railroad to downgrade or dispose of a facility within 30 days after the date such application is submitted, the Secretary shall promptly approve such application.

(2) If the Corporation makes a timely objection to such an application, the Secretary shall, within 180 days after the date of such objection, determine the costs which the railroad could avoid if it were not required to maintain or retain the facility in the condition requested by the Corporation. If the Corporation does not, within 60 days after the date of the Secretary's determination, agree to pay such avoidable costs to the railroad, the Secretary shall approve such application.

(d) Avoidable costs-agreement considerations; analysis of facilities; survey plans

(1) In electing whether to enter into an agreement pursuant to this section to pay a railroad the avoidable costs of maintaining or retaining a facility, the Corporation shall consider—

(A) the potential importance of restoring rail passenger service on the route on which such facility is located;

(B) the market potential of such route;

(C) the availability, adequacy, and energy efficiency of alternate modes or alternate rail lines for providing passenger transportation to or near the points which would be served by the route;

(D) the extent to which major population centers would be served by such route;

(E) the extent to which the provision of service over such route would encourage the expansion of a national intercity rail passenger system; and

(F) the possibility of increased ridership on lines of railroad connecting with such route.

(2)(A) In order to prepare for a valid and timely analysis of a facility, after a railroad gives notice pursuant to this section that it intends to downgrade or dispose of such facility, the Corporation shall conduct a survey of population centers with railroad passenger service facilities and shall update such survey from time to time as may be necessary or appropriate. Within 90 days after September 29, 1979, the Corporation shall take steps to prepare a survey plan which shall provide for—

(i) a target completion date for the survey of population centers of not later than 360 days after the ninetieth day after September 29, 1979; and

(ii) a system of collection, compilation, and storage of information gathered pursuant to the survey according to geographic region and according to whether a facility would be part of a short- or long-haul route.

(B) The survey should facilitate an analysis of—

(i) ridership potential by ascertaining existing travel patterns or changing travel patterns which would maximize efficiencies of railroad passenger service:

(ii) the quality of service of competitors or likely competitors;

(iii) the likelihood of the Corporation offering service at a competitive fare;

(iv) opportunities to target advertising and fares to potential classes of riders;

(v) economic characteristics of railroad passenger service associated with a facility and the extent to which such characteristics are consistent with sound economic principles of short- or long-haul railroad operations; and

(vi) the feasibility of applying effective internal cost controls to a facility and the route which the facility would serve in order to improve over time the ratio of transportation expenses, excluding maintenance of track, structure, and equipment and depreciation, to passenger revenue.

(e) Definitions; obligations unaffected by downgrading or disposal of facilities

For purposes of this section—

(1) the term "facilities" means railroad tracks, rights-of-way, fixed equipment and facilities, and real property appurtenant thereto, and includes signal systems, passenger station and repair tracks, station buildings, platforms, and adjunct facilities such as water, fuel, steam, electric, and air lines;

(2) the downgrading of a facility means a reduction in track classification as specified in the Federal Railroad Administration track safety standards (49 C.F.R. 213), or any other change in such facilities which may increase the time required for a passenger train to operate over the route on which such facility is located; and

(3) approval of downgrading or disposal under this section shall not be construed as relieving a railroad from compliance with its other common carrier or legal obligations with respect to a facility.

SUBCHAPTER VI—FEDERAL FINANCIAL ASSISTANCE

§ 601. Authorization of appropriations

(a) Capital acquisition and corridor development

(1) Northeast Corridor

There are authorized to be appropriated to the Secretary for the benefit of the Corporation for making capital expenditures under title VII of the Railroad Revitalization and Regulatory Improvement Act of 1976 (45 U.S.C. 851 et seq.)—

(A) $220,000,000 for fiscal year 1993; and

(B) $250,000,000 for fiscal year 1994.

(2) General capital expenditures

There are authorized to be appropriated to the Secretary for the benefit of the Corporation for making capital expenditures under this chapter—

(A) $250,000,000 for fiscal year 1993; and

(B) $250,000,000 for fiscal year 1994.

(3) New corridor development

(A) In general

Of the amounts appropriated pursuant to paragraphs (1) and (2), not more than 15 percent of each amount shall be made available for projects described in subparagraphs (B) and (C) of this paragraph.

(B) Corridors between densely populated cities

(i) Except as provided in clause (ii), funds made available under subparagraph (A) shall be used

to develop new intercity rail passenger service on corridors—

(I) between cities undergoing significant population growth; and

(II) where such service can reasonably be expected to provide travel times comparable with other surface transportation modes.

(ii) Amounts shall be expended for the purposes described in clause (i) only if the service is requested by a State or States and the Corporation and such State or States agree that—

(I) at least 90 percent of the cost of the acquisition of rolling stock for such service shall be paid by the Corporation; and

(II) at least 90 percent of the cost of improvements in the right-of-way, including track structure, signal systems, passenger station facilities, highway and pedestrian grade crossings, and other safety equipment or facilities, shall be paid by the State or States.

(iii) Service described in clause (i) shall be subject to section 563(b) of this title with respect to operating expenses.

(C) Long distance rail passenger corridor development

(i) Except as provided in clause (ii), funds made available under subparagraph (A) shall be used to initiate new long distance intercity rail passenger service.

(ii) Amounts shall be expended for the purposes described in clause (i) only if the service is requested by a State or States and the Corporation and such State or States agree that—

(I) at least 75 percent of the cost of the acquisition of rolling stock for such service shall be paid by the Corporation; and

(II) at least 90 percent of the cost of improvements in the right-of-way, including track structure, signal systems, passenger station facilities, highway and pedestrian grade crossings, and other safety equipment or facilities, shall be paid by the State or States.

(iii) Service described in clause (i) shall be subject to section 563(b) of this title with respect to operating expenses.

(b) Operating expenses

(1) Core system

There are authorized to be appropriated to the Secretary for the benefit of the Corporation for operating expenses—

(A) $381,000,000 for fiscal year 1993; and

(B) $381,000,000 for fiscal year 1994.

Of the amounts appropriated in subparagraphs (A) and (B), not more than 5 percent for each fiscal year shall be used for the payment of operating expenses under section 563(b) of this title for service in operation as of September 30, 1992.

(2) New State-supported service

There are authorized to be appropriated to the Secretary for the benefit of the Corporation for operating losses under section 563(b) of this title for service commencing after September 30, 1992—

(A) $7,500,000 for fiscal year 1993; and

(B) $9,500,000 for fiscal year 1994.

The expenditure by the Corporation of funds appropriated for operating losses under section 563(b) of this title for service commencing after September 30, 1992, shall not be considered to be an operating expense for purposes of calculating the revenue-to-operating expense ratio of the Corporation.

(c) Mandatory payments

There are authorized to be appropriated to the Secretary $150,000,000 for fiscal year 1993, and such sums as may be necessary for fiscal year 1994, for the payment of—

(1) tax liabilities under section 3221 of title 26 due in such fiscal years in excess of amounts needed to fund benefits for individuals who retire from the Corporation and for their beneficiaries;

(2) obligations of the Corporation under section 358(a) of this title due in such fiscal years in excess of its obligations calculated on an experience-rated basis; and

(3) obligations of the Corporation due under section 3321 of title 26.

Funds appropriated under this subsection shall not be considered a Federal subsidy of the Corporation.

(d) Administration of appropriations

Funds appropriated pursuant to this section shall be made available to the Secretary during the fiscal year for which appropriated, except that appropriations for capital acquisitions and improvements may be made in an appropriations Act for a fiscal year preceding the fiscal year in which the appropriation is to be available for obligation. Funds appropriated are authorized to remain available until expended. Appropriated sums shall be paid by the Secretary to the Corporation for expenditure by it in accordance with the Secretary's budget request as approved or modified by Congress at the time of appropriation. Payments by the Sec-

retary to the Corporation of appropriated funds shall be made no more frequently than every 90 days, unless the Corporation, for good cause, requests more frequent payment before the expiration of any 90-day period.

(e) Schedule of payments

In each fiscal year in which funds are authorized to be appropriated under this section, payments by the Secretary to the Corporation of appropriated funds shall be made on the following basis—

(1) 50 percent on the first day of a fiscal year;

(2) 25 percent on the first day of the second quarter of a fiscal year; and

(3) 25 percent on the first day of the third quarter of a fiscal year.

SUBCHAPTER VIII—MISCELLANEOUS PROVISIONS

§ 644. Records and audit of the Corporation and certain railroads

(1)(A) The accounts of the Corporation shall be audited annually in accordance with generally accepted auditing standards by independent certified public accountants or independent licensed public accountants certified or licensed by a regulatory authority of a State or other political subdivision of the United States. The audit shall be conducted at the place or places where the accounts of the Corporation are normally kept. All books, accounts, financial records, reports, files, and other papers, things, or property belonging to or in use by the Corporation and necessary to facilitate the audit shall be made available to the person conducting the audit; and full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians shall be afforded to such person.

(B) The report of each such independent audit shall be included in the annual report required by section 548(a) of this title. The audit report shall set forth the scope of the audit and include such statements as are necessary to present fairly the Corporation's assets and liabilities, surplus or deficit, with an analysis of the changes therein during the year, supplemented in reasonable detail by a statement the Corporation's income and expenses during the year, and a statement of the sources and application of funds, together with the independent auditor's opinion of those statements.

(2)(A) The Comptroller General of the United States may conduct performance audits of the activities and transactions of the Corporation in accordance with generally accepted management principles, and under such rules and regulations as may be prescribed by the Comptroller General. Any such audits shall conducted at such place or places as the Comptroller General may deem appropriate. The representa-

tive of the Comptroller General shall have access to all books, accounts, records, reports, files, and other papers, things, or property belonging to or in use by the Corporation pertaining to its financial and other transactions and necessary to facilitate the audits, and they shall be afforded full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians. All such books, accounts, records, reports, files, papers, and property of the Corporation shall remain in possession and custody of the Corporation.

(B) To the extent the Comptroller General deems necessary in connection with audits as he may make of the financial transactions of the Corporation pursuant to paragraph (A) of this subsection, his representatives shall have access to all books, accounts, records, reports, files, and other papers, things, or property belonging to or in use by any railroad with which the Corporation has entered into a contract for the performance of intercity rail passenger service, pertaining to such railroad's financial transactions and necessary to facilitate the audits, and such representatives shall be afforded full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians. All such books, accounts, records, reports, files, papers, and property of such railroad shall remain in the possession and custody of the railroad.

(C) A report of each such audit shall be made by the Comptroller General to the Congress. The report to the Congress shall contain such comments and information as the Comptroller General may deem necessary to inform Congress of the financial operations and condition of the Corporation, together with such recommendations with respect thereto as he may deem advisable. The report shall also show specifically any program, expenditure, or other financial transaction or undertaking observed in the course of the audit, which, in the opinion of the Comptroller General, has been carried on or made without authority of law. A copy of each report shall

be furnished to the President, to the Secretary, and to the Corporation at the time submitted to the Congress.

§ 650a. National Railroad Passenger Corporation; petitions for relocation or other remedial assistance for dangerous conditions; recommendation by Secretary to Congress

(1) The National Railroad Passenger Corporation (hereafter in this section referred to as "Amtrak"), or the owner of any facility which presents a danger to the employees, passengers, or property of Amtrak, may petition the Secretary for assistance to the owner of such facility for relocation or other remedial measures to minimize or eliminate such danger under this section.

(2) If the Secretary determines that—

(A) a facility which is the subject of a petition under paragraph (1) presents a danger of death or serious injury to any employee or passenger of Amtrak or serious damage to any property of Amtrak; and

(B) the owner of such facility should not be expected to bear the cost of relocating or other remedial measures necessary to minimize or eliminate such danger the Secretary shall recommend to the Congress that the Congress authorize funding, by reimbursement or otherwise, for such relocation or other remedial measures.

(3) Petitions may be submitted under paragraph (1) with respect to any relocation or remedial measures undertaken on or after January 1, 1978.

SUBCHAPTER I—GENERAL PROVISIONS

§ 701. Congressional declaration of policy

(a) Findings

The Congress finds and declares that—

(1) Essential rail service in the midwest and northeast region of the United States is provided by railroads which are today insolvent and attempting to undergo reorganization under the Bankruptcy Act.

(2) This essential rail service is threatened with cessation or significant curtailment because of the inability of the trustees of such railroads to formulate acceptable plans for reorganization. This rail service is operated over rail properties which were acquired for a public use, but which have been permitted to deteriorate and now require extensive rehabilitation and modernization.

(3) The public convenience and necessity require adequate and efficient rail service in this region and throughout the Nation to meet the needs of commerce, the national defense, the environment, and the service requirements of passengers, United States mail, shippers, States and their political subdivisions, and consumers.

(4) Continuation and improvement of essential rail service in this region is also necessary to preserve and maintain adequate national rail services and an efficient national rail transportation system.

(5) Rail service and rail transportation offer economic and environmental advantages with respect to land use, air pollution, noise levels, energy efficiency and conversation, resource allocation, safety, and cost per ton-mile of movement to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest.

(6) These needs cannot be met without substantial action by the Federal Government.

(b) Purposes

It is therefore declared to be the purpose of Congress in this chapter to provide for—

(1) the identification of a rail service system in the midwest and northeast region which is adequate to meet the needs and service requirements of this region and of the national rail transportation system;

(2) the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region;

(3) the establishment of the United States Railway Association, with enumerated powers and responsibilities;

(4) the establishment of the Consolidated Rail Corporation, with enumerated powers and responsibilities;

(5) assistance to States and local and regional transportation authorities for continuation of local rail services threatened with cessation; and

(6) necessary Federal financial assistance at the lowest possible cost to the general taxpayer.

No. 93-1525

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL A. LEBRON,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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September 8, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether Amtrak's refusal to lease space for the display of a political advertisement in Penn Station constitutes government action subject to challenge under the First Amendment, when the government did not coerce, encourage, or influence Amtrak's action in any way.

RULE 29.1 LISTING

The National Railroad Passenger Corporation has no parent companies or subsidiaries.

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1A J. Sackman, *Nichols' The Law of Eminent Domain*, § 3.231 (rev. 3d ed. 1994)	26
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1525

MICHAEL A. LEBRON,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Petitioner seeks an order compelling Amtrak to display a 103-foot long political advertisement on an illuminated billboard that dominates the entrance to Penn Station in New York City. (Copies of the proposed ad have been lodged with the Clerk, and the text is reprinted as an appendix to this brief.) Amtrak refused to lease its billboard space to petitioner based on a long-standing policy prohibiting political advertising in Penn Station. The question presented to this Court is whether Amtrak's decision to reject petitioner's political ad should be treated as that of the United States government.

A. Amtrak

1. *Amtrak's Creation As a Nongovernmental Corporation*

Amtrak (the National Railroad Passenger Corporation) was established in 1971 as a for-profit corporation engaged

in the commercial enterprise of offering intercity and commuter rail passenger service. Congress authorized the creation of Amtrak in response to the dramatic decline in intercity rail transportation that had occurred in the decades following World War II. Whereas in 1929 approximately 20,000 passenger trains operated in the United States, by 1970 fewer than 500 remained.[1] Many of the railroads that continued in operation were suffering heavy losses. The total rail passenger deficit for 1969 alone was roughly $200 million.[2] As common carriers, the railroads were bound to continue operating unprofitable lines unless the Interstate Commerce Commission or state regulatory authorities relieved them of that responsibility. By 1970, the railroads were seeking ICC permission to discontinue more than 100 of the remaining intercity passenger lines.[3]

The Rail Passenger Service Act of 1970 ("RPSA"), Pub. L. No. 91-518, 84 Stat. 1328, 45 U.S.C. § 501 *et seq.* (1988 & Supp. IV 1992), was Congress's effort to preserve and revive the failing intercity passenger train industry. "On concluding that a reorganized and restructured rail passenger system could be successful, Congress established the National Railroad Passenger Corporation, a private for-profit corporation that has come to be known as Amtrak." *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 454 (1985). Congress authorized the creation of Amtrak to "revitalize rail passenger service in the expectation that the rendering of such service along certain corridors can be made a profitable commercial undertaking, particularly with new equipment or advanced vehicles." H.R. Rep. No. 1580, *reprinted in* 1970 U.S.C.C.A.N. at 4735.

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[1] House Committee on Interstate and Foreign Commerce, Rail Passenger Service Act of 1970, H.R. Rep. No. 1580, 91st Cong., 2d Sess. (1970) (hereinafter cited as "H.R. Rep. No. 1580"), *reprinted in* 1970 U.S.C.C.A.N. 4735, 4736.

[2] *Id.* at 4737.

[3] *Id.* at 4736.

Congress explicitly directed that "[t]he Corporation will not be an agency or establishment of the United States Government." Pub. L. No. 91-518, § 301, 84 Stat. 1327, 1330 (1970) (current version at 45 U.S.C. § 541). Instead, the statute declared, Amtrak would be a "for profit corporation" subject to the District of Columbia Business Corporation Act. *Id.* Likewise, the House Report accompanying the RPSA twice explained that Amtrak would be a "private, for profit corporation." H.R. Rep. No. 1580, *reprinted in* 1970 U.S.C.C.A.N. at 4739, 4742.

The RPSA authorized Amtrak to enter into standardized contracts with the railroads, known as "Basic Agreements," pursuant to which the railroads would be relieved of their common carrier responsibilities to provide intercity rail passenger service. 45 U.S.C. § 561(a). Those railroads that entered into Basic Agreements agreed to pay Amtrak amounts calculated by reference to their prior losses attributable to intercity passenger service. Payments were made in cash or, at Amtrak's option, by the transfer of rail passenger equipment or the provision of services. *Id.* In return, the railroads received common stock in amounts equivalent in par value to their payments (unless they waived that right in favor of a tax write-off). *Id.*

The railroads' payments to the new corporation totaled $197 million.[4] Congress supplemented that amount with an outright grant to Amtrak of $40 million. Pub. L. No. 91-518, § 601, 84 Stat. 1327, 1338 (1970).

The RPSA directed the Secretary of Transportation to design a route system over which the new corporation would be required to provide intercity rail passenger service. 45 U.S.C. § 521. Aimed at shedding unprofitable and nonessential routes, the resulting "Basic System" elimi-

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[4] G. Hilton, *Amtrak: The National Railroad Passenger Corporation* 16-17 (1980) (hereinafter cited as "Hilton").

nated nearly half the passenger routes then in service.[5] Amtrak began providing rail passenger service on this reduced basis on May 1, 1971.

2. *Amtrak's Acquisition of Rail Lines*

When Amtrak began operations in 1971, its activities were limited to providing administrative functions such as booking reservations, selling tickets, and providing marketing services. Amtrak itself owned no track and operated no trains directly, but instead contracted with other railroads to provide actual rail service.[6] Under these arrangements, in fiscal year 1972 Amtrak earned $163 million in revenues, but incurred $310 million in expenses. JA 680.[7]

The Regional Rail Reorganization Act of 1973 ("3-R Act")[8] and the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act")[9] provided Amtrak the opportunity to acquire its own rail lines. Pursuant to this legislation, the United States ultimately paid the bankrupt Penn Central Corporation $2.113 billion (which included interest) for approximately 19,000 miles of rail lines and related property. JA 188-89; E 968-1038. Penn Central conveyed this property to Conrail, a private for-profit freight railroad established pursuant to the 3-R Act. Conrail in turn sold Amtrak 621 miles of rail lines and related property, including Penn Station and most of the Northeast Corridor between Washington and Boston, for $87 million. *See* 45 U.S.C. §§ 716, 791(d)(1); JA

[5] *See* Tobey, *Costs, Benefits, and the Future of Amtrak*, 16 Transp. L.J. 245, 258 & n.60 (1987) (hereinafter cited as "Tobey").

[6] Tobey, *supra* note 5, at 261.

[7] Citations to JA —— are to pages of the joint appendix. Citations to Pet. App. —— are to pages of the appendix to the petition. Citations to C.A. App. —— and E —— are to pages of the joint appendix and exhibit volumes in the court of appeals.

[8] Pub. L. No. 93-236; 45 U.S.C. § 701 *et seq.* (1988).

[9] Pub. L. No. 94-210; 45 U.S.C. § 801 *et seq.* (1988).

407-09; Hilton, *supra* note 4, at 27.[10] Thus, beginning in 1976, Amtrak owned its own tracks and was able to provide service directly instead of through contracting railroads.

From the early 1980's onward, Amtrak has undertaken concentrated efforts to reduce costs, increase productivity, and improve overall competitiveness. With the acquisition of its own trackage and modern, more efficient equipment, Amtrak's efforts have been largely successful. In 1982, Amtrak relied upon federal subsidies to cover 47 percent of operating expenses. That figure had been reduced to 31 percent of operating expenses by 1988, and to only 18 percent of the railroad's operating expenses by 1992.[11]

3. *Amtrak's Current Structure and Operations*

Amtrak's current structure and operations are in most respects like those of other for-profit corporations. Amtrak is chartered under the District of Columbia Business Corporation Act. 45 U.S.C. § 541. Amtrak's corporate governance is dictated by the company's Articles of Incorporation and Bylaws. JA 624-57. Amtrak holds regular and special board of directors meetings, JA 636, and issues annual reports, JA 602-23. Like any other for-profit corporation—but unlike any government agency or entity—Amtrak files U.S. corporate income tax returns. JA 598-601.

Amtrak is authorized to issue and have outstanding two classes of capital stock, common and preferred, both of which are eligible to vote and receive dividends. 45 U.S.C. § 544.[12] Amtrak's common shares are held

[10] The district court and petitioner incorrectly state that $2.113 billion was the price paid for the Northeast Corridor properties conveyed to Amtrak. Pet. App. 9b n.7; Br. Pet. 6, 10.

[11] These percentages are reflected in Amtrak's "Revenue-to-Expense Ratio." *See* JA 620, 375, 699.

[12] Petitioner states erroneously (and repeatedly) that Amtrak's common shareholders have no voting rights. *E.g.*, Br. Pet. 8, 21. While the common shareholders do not elect Amtrak's directors,

by four other private railroads: The Grand Trunk Western Railroad Company, Burlington Northern, Inc., Soo Line Railroad Company, and The Penn Central Corporation (which is no longer in business as a railroad). JA 134. The United States holds Amtrak's preferred stock, which it received in exchange for financial assistance to the corporation. 45 U.S.C. § 544(c).

Amtrak's nine-person board of directors is composed primarily of private individuals associated with the railroad industry. They include two board members selected by the President from a list submitted by commuter authorities; one member selected by the President from a list recommended by the Railway Labor Executives Association, a labor organization; one selected by the President from among governors of states with an interest in rail transportation; one selected by the President "as a representative of business with an interest in rail transportation"; two members selected by the Secretary of Transportation as holder of Amtrak's preferred shares; the Secretary of Transportation; and the president of the corporation, who is selected by the other board members. 45 U.S.C. § 543. With the exception of the Secretary of Transportation and the president of the corporation, Amtrak's board members serve defined terms, as set forth in the RPSA. *Id.*

Amtrak is not covered by the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* (1988), and, unlike the federal government, is subject to liability for punitive damages. *See, e.g., Sentner v. Amtrak*, 540 F. Supp. 557 (D.N.J. 1982). Amtrak is not an "agency" within the meaning of the Administrative Procedure Act. *See* 5 U.S.C. § 551(1) (1988); *Ehm v. National Railroad Passenger Corp.*, 732 F.2d 1250, 1252 (5th Cir.), *cert. denied*, 469 U.S. 982 (1984). Nor is Amtrak subject to the procurement and contracting requirements that apply to the government. *See* 41 U.S.C. § 5 *et seq.* (1988).

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they are entitled to vote on all other matters. *See* 45 U.S.C. § 544; H.R. Rep. No. 1580, *reprinted in* 1970 U.S.C.C.A.N. at 4742.

The United States does not supervise Amtrak's day-to-day operations. Nor are any of Amtrak's officers and employees employed by the federal government. JA 134.

B. The Spectacular

On the west side of the upper level of Penn Station, dominating the main entrance to Amtrak's waiting room and ticket area, is a curved, 103-foot long by 10-foot high illuminated billboard known as "the Spectacular." Pet. App. 3a. The Spectacular was constructed in 1967 by Transportation Displays, Incorporated ("TDI"), a privately held advertising company, pursuant to a contract with the Pennsylvania Railroad Company, which then owned Penn Station. The contract gave TDI the right to "construct and maintain, at [its] own cost and expense, an advertising [S]pectacular display for sale to advertisers." JA 318. TDI agreed to pay the railroad a percentage of the gross receipts derived from advertising displayed on the Spectacular, and it agreed further that no advertisement would be displayed without prior approval of the railroad. JA 319, 325-26.

Amtrak, which now owns Penn Station and exercises complete control over the area where the Spectacular is located, has continued essentially the same arrangement that the Pennsylvania Railroad Company had with TDI. The contract now in effect between Amtrak and TDI authorizes TDI to sell advertising space on the Spectacular and in other locations, and provides that TDI shall pay Amtrak a percentage of its net receipts. JA 201-02. It also expressly provides that "[a]ll advertising material, exhibit material, notices and advertisements and their manner of presentation and design, shall be subject to approval by Amtrak." JA 204.

Advertising on the Spectacular is overseen by Amtrak's Real Estate and Operations Development Department, which is responsible for all corporate profit-making ventures other than running the railroad. JA 15-17. The Vice President for that Department, Anthony DeAngelo,

applies Amtrak's advertising policies and makes the final decision whether to approve ads for the Spectacular. JA 15-16.

Political advertising has always been prohibited on the Spectacular. JA 15, 34, 326; C.A. App. 844. The Pennsylvania Railroad Company adopted that policy in 1967 when the Spectacular was first built—years before Amtrak was created. JA 326. Amtrak continued the policy when it assumed control over the Spectacular in 1976 because, like the Pennsylvania Railroad, it recognized that partisan displays might offend some of its customers. JA 15-16. In the 27 years since its construction, no political or other noncommercial advertisement has ever appeared on the Spectacular. As Chief Judge Newman noted in his dissent below, "Amtrak's billboard space in Pennsylvania Station . . . has not become a forum for ads of such pointed political content as Lebron's attack on the makers of Coors beer for promoting 'The Far Right's political agenda.'" Pet. App. 16a.

C. Amtrak's Rejection of Petitioner's "Advertorial"

Petitioner's proposed "advertorial," as he calls it, is a photomontage of convivial Coors drinkers, juxtaposed with a scene in which Nicaraguan villagers are menaced by a flaming Coors beer can hurtling toward them like a missile. In addition to its powerful visual image, the advertorial contains considerable text, superimposed on an American flag, which is sharply critical of the Coors family's support of "The Far Right's political agenda." Pet. App. 5a; *see* appendix to this brief.

On November 30, 1992, petitioner signed a contract with TDI to display his ad for two months on the Spectacular. JA 669. Petitioner knew when he signed the TDI contract that the "transportation facility" (*i.e.*, Amtrak) retained the right to reject his ad. C.A. App. 269-74. And he anticipated that there might be objection to the display of his advertorial on the Spectacular because of its "unusual nature." As he conceded, "[i]t wasn't

commercial in the way they are used to." C.A. App. 228. In fact, "because of the subject matter" of his work, petitioner deliberately avoided disclosing its content to TDI until December 2, 1992, two days after he signed the TDI contract. C.A. App. 201-03, 211.

On December 17, the ad was presented to Amtrak's Vice President, Anthony DeAngelo, for his approval. He immediately rejected the ad as political. JA 36, 122-24. In a letter dated December 23, 1992, DeAngelo notified TDI of his decision, invoking Amtrak's longstanding "policy . . . that it will not allow political advertising on the [S]pectacular advertising sign." Pet. App. 5a.

D. The Decisions Below

Petitioner commenced this action on December 30, 1992. After a trial conducted on documentary submissions, the district court issued an opinion and order directing Amtrak to give petitioner immediate access to the Spectacular. Noting that "[p]laintiff does not contend that Amtrak is a governmental agency," the court held, nevertheless, that Amtrak "must be deemed to engage in governmental action when it undertakes to regulate the content of the advertisements on its billboards." Pet. App. 10b, 14b. The district court then ruled that Amtrak's rejection of petitioner's ad violated the First Amendment. A three-judge panel of the court of appeals issued a stay pending appeal. Pet. App. 6a.

In an opinion written by Judge Mahoney and joined by Judge Lumbard, the court of appeals reversed, holding that Amtrak is not a government actor for constitutional purposes. Pet. App. 12a. The court began its analysis by noting that Amtrak is "a private, for-profit corporation under the District of Columbia Business Corporation Act," and that Congress specified that "Amtrak is 'not . . . an agency, instrumentality, authority, or entity, or establishment of the United States Government.'" Pet. App. 7a (quoting 45 U.S.C. § 541). The court of appeals wrote, as petitioner had argued, that the question whether Amtrak is a government actor was governed by

the framework for "discerning the presence of government action in the activities of private entities" set forth in this Court's decisions in *Blum v. Yaretsky*, 457 U.S. 991 (1982), *Flagg Brothers Inc. v. Brooks*, 436 U.S. 149 (1978), *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). Pet. App. 7a-8a.

Looking to the "numerous cases" holding that Amtrak and the similarly structured Conrail are not "subject to constitutional restraints upon government action," Pet. App. 11a, the court of appeals quoted with approval its earlier finding in one such case: "[D]espite federal funding, regulation, stock ownership and representation on the board of directors, there is nothing resembling federal supervision of day-to-day activities." Pet. App. 9a (quoting *Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 55-56 (2d Cir. 1985)). The court then held that "[i]n view of this unvarying line of authority, and the fact that our pertinent precedent [*Myron*] addressed an issue of First Amendment retaliation, . . . we conclude that Amtrak's refusal to run [petitioner's] advertisement on the Spectacular was not governmental action . . . ." Pet. App. 12a. Chief Judge Newman dissented from that conclusion.

The panel majority did not reach the question whether Amtrak's advertising policy would have withstood First Amendment scrutiny if Amtrak were a government actor.

SUMMARY OF ARGUMENT

Amtrak is a nongovernmental, for-profit corporation created to perform the commercial function of operating a railroad. Such a corporation is free to determine for itself whether it wishes to provide a forum for political speech in its facilities. And absent evidence that the government has coerced or influenced the corporation's decision to ban political advertising, that decision is not subject to challenge under the First Amendment.

1. Amtrak is not a government entity, and the petitioner so conceded in the courts below. The statute that

authorized the creation of Amtrak provides expressly that "[t]he Corporation will not be an agency, instrumentality, authority, or entity, or establishment of the United States Government." 45 U.S.C. § 541. The same statute instructs that Amtrak "shall be operated and managed as a for profit corporation." *Id.* Congress was not engaged in a sham, and it was not mistaken, when it adopted these provisions. They accurately reflected Congress's intent that Amtrak exercise a commercial, not a governmental function, and that it operate as a commercial enterprise, distinct from the government. There is no reason for this Court to disregard these "constitutional" provisions that tell Amtrak what it is and how it should conduct itself.

This Court has, in fact, already held that Amtrak is a nongovernmental entity, whose contractual obligations are not those of the United States. *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451 (1985). That decision forecloses petitioner's contention, asserted for the first time in this Court, that Amtrak is a government entity, subject at all times and in all settings to the commands and constraints of the Constitution. In addition, in a variety of settings, numerous courts of appeals and district courts unanimously have rejected the contention that Amtrak's actions are subject to constitutional constraints. Those decisions also confirm that Amtrak is not a government entity.

2. This Court has held generally that a decision of a nongovernmental entity, such as Amtrak, is subject to constitutional constraints "only when [the government] has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice in law must be deemed to be that of the [government]." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). There is no evidence that the government exercised any coercive power or encouragement in this case. The policy of prohibiting political advertising on the Spectacular was developed by the private railroad that owned Penn Station

before Amtrak. It has been continued and applied by Amtrak's real estate department for purely commercial reasons and without government interference or influence. The government, in short, has had no role in formulating or applying the policy against political advertising. For this reason, there has been no government action in this case.

3. In a very limited factual and legal setting, this Court has recognized that *inaction* by the government may trigger application of the equal protection clause of the Fourteenth Amendment. In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the Court held that the government's failure to ensure nondiscriminatory access to the portion of a public building leased to a restaurant violated the Fourteenth Amendment, at least when the restaurant was indispensable to the financial success of the government operation occupying the remainder of the building. Even in the context of racial discrimination, however, the holding in *Burton* has been limited to its facts. It should not be extended to this case. *Burton* recognized that the government's "inaction" may in some circumstances constitute an "abdicat[ion]" of its affirmative "responsibilities under the Fourteenth Amendment." *Id.* at 725. But the First Amendment imposes no comparable responsibility upon the government to prevent a nongovernmental entity from excluding political advertising from that entity's facilities. To the contrary, the First Amendment commands the government *not* to interfere in such matters. The federal government's inaction in this case, therefore, does not raise a constitutional question.

ARGUMENT

Petitioner argues that Amtrak is either (1) a government entity whose actions always constitute government action or (2) a nongovernmental entity whose actions constitute government action in this case. The first argument was explicitly waived by the petitioner below. Both are wrong.

I. AMTRAK IS NOT A GOVERNMENT ENTITY

A. Petitioner Has Conceded That Amtrak Is Not a Government Entity

Petitioner's theory of government action has undergone a complete reversal in this Court. In the lower courts, petitioner conceded that Amtrak is a "private entity." Thus, petitioner explained to the district court: "*plaintiff does not contend that Amtrak is a government entity, but a private entity so interrelated to federal and state entities that it should be treated as a state actor here* . . . ." C.A. App. 1308 (Plaintiff Michael Lebron's Pre-Trial Proposed Conclusions of Law, at 12 n.1 (emphasis added)). The district court explicitly noted petitioner's concession:

> Plaintiff does not contend that Amtrak is a governmental agency. What plaintiff contends is that the federal government is sufficiently intertwined in Amtrak's operations and authority that the particular actions at issue must be deemed governmental action. Pet. App. 10b.

Similarly, in the court of appeals, petitioner responded to the unbroken line of authority holding that Amtrak is not a government entity—including this Court's decision in *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451 (1985)—by once again arguing:

> Many of the cases cited by Amtrak do not address state action issues at all, but simply state that Amtrak is not a governmental entity. *Since Lebron does*

> *not contend that Amtrak is a government entity per se, but rather is so interrelated to state entities that it should be treated as a state actor here, these cases are inapposite.*

Brief for Michael A. Lebron in the Court of Appeals, at 30 n.39 (emphasis added). Petitioner's sole argument was that "[a] *private entity* can be a state actor for some purposes but not others." *Id.* at 30 (emphasis added). Like the district court, the court of appeals accepted petitioner's framing of the question and agreed with petitioner that the question was governed by this Court's framework "for discerning the presence of government action in the activities of private entities." Pet. App. 7a.

Recognizing that he cannot establish that the federal government coerced or encouraged Amtrak's decision to reject his advertorial, *see* Part II, *infra*, petitioner now argues just the opposite of what he argued below: "In most state action cases, the Court must determine whether the conduct of a private entity should be treated as state action because of government involvement with that entity. Here, by contrast, the entity that acted—Amtrak—is itself a governmental entity." Br. Pet. 17.

Petitioner's new argument, advanced for the first time in his brief on the merits,[13] is not properly before the Court. This Court "ordinarily will not decide questions not raised or litigated in the lower courts." *Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam); *see also*

[13] The petition presented the question that was presented below—whether there was government action in this case based on the government's relationship to a nongovernmental entity. The question whether Amtrak is a government entity is perhaps a "related" or "complementary" question, but "neither of the two questions is subsidiary to the other. Both might be subsidiary to a question embracing both [*i.e.*, whether there was government action in this case] . . . , but the two exist side by side, neither encompassing the other." *Yee v. City of Escondido*, 112 S. Ct. 1522, 1533 (1992); *see* S. Ct. R. 14.1(a). If the petition had raised the separate question now being presented in petitioner's brief, respondent would have opposed the petition on the ground that the argument was conceded below.

Taylor v. Freeland & Kronz, 112 S. Ct. 1644, 1649 (1992); *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195 n.2 (1989); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam). Even more clearly, the Court does not consider arguments that were "expressly waived" and affirmatively "abandoned" in the courts below. *Helvering v. Wood*, 309 U.S. 344, 348-49 (1940); *see also Steagald v. United States*, 451 U.S. 204, 209, 211 (1981); *United States v. Ortiz*, 422 U.S. 891, 898 (1975).[14]

Because petitioner has presented as the principal point in his brief an argument that he explicitly waived below—and because he has virtually withdrawn the contention argued so vigorously in his petition and reply that "Amtrak's Presidentially-appointed Board explicitly adopted the policy against political advertising at issue here," Reply Mem. 3; *see* p. 38, *infra*—it would be appropriate to dismiss the petition as improvidently granted. *See, e.g., Springfield v. Kibbe, supra*; *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). At the very least, petitioner's attack on the court of appeals' decision should be limited to the arguments that he presented to the court of appeals. He should not be permitted to argue that the court of appeals was wrong for a reason that he explicitly disavowed in both courts below.

[14] In *Yee v. City of Escondido, supra*, the Court noted that when a federal constitutional claim is made in state court, the parties are not limited in this Court "to the precise arguments made below" in support of that claim. 112 S. Ct. at 1532. In that case, however, its was "unclear" whether the petitioner had raised, and whether the court of appeals had addressed, the argument in question. Here, by contrast, it is clear not only that the argument was not raised or addressed, but that it was explicitly withdrawn as conceded. Petitioner here, "through [his] assertions, concessions, and acquiescence, has lost [his] right" to argue that Amtrak is a government entity. *Steagald v. United States*, 451 U.S. at 211.

B. Amtrak's Status as a Nongovernmental Entity Is Firmly Established

Petitioner's attempt to reverse course in this Court is futile in any event. As Congress, this Court, and every lower court that has considered the issue have made clear, Amtrak is *not* a government entity.

1. *Congress Has Declared That Amtrak Is Not a Government Entity*

The statute that authorized the creation of Amtrak also defined its identity. Congress specifically declared that Amtrak "will not be an agency or establishment of the United States Government." Pub. L. No. 91-518, § 301, 84 Stat. 1327, 1330 (1970). Rather, Amtrak was established as a "for profit corporation" organized under the District of Columbia Business Corporation Act. *Id.*[15]

Congress's determination that Amtrak should function as a for-profit corporation, not a government agency, has not wavered since Amtrak's inception. Even as Amtrak encountered difficulty attaining its objective of making a profit, Congress reaffirmed its determination that Amtrak "shall be operated and managed as a for profit corporation." Pub. L. No. 95-421 (1978); 45 U.S.C. § 541. The stated purpose of this reaffirmation was simply to "insur[e] that Amtrak is operated as a for profit corporation even though it may continue to require very substantial operating subsidies."[16] Again in 1988, Congress

[15] That Congress authorized Amtrak's incorporation is of no significance. "[A]ll corporations act under charters granted by a government, usually by a State. They do not thereby lose their essentially private character." *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 543-44 (1987).

[16] House Committee on Interstate and Foreign Commerce, Amtrak Improvement Act of 1978, H.R. Rep. No. 1182, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 2313, 2317.

reaffirmed Amtrak's nongovernmental status when it amended the RPSA to state that "[t]he Corporation will not be an agency, *instrumentality, authority, or entity*, or establishment of the United States Government." 45 U.S.C. § 541 (italicized language added).[17]

Amtrak is different in this respect from the other "corporations" referred to in petitioner's brief—the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, the Federal Crop Insurance Corporation, and the Pension Benefit Guaranty Corporation. Each of those corporations was created explicitly as an agency or instrumentality of the United States.[18] Amtrak is also differ-

[17] The fact that Congress has decided, selectively, to make Amtrak subject to a handful of statutes that apply to the government does not alter its basic determination that Amtrak is not part of the government. Indeed, the fact that Congress felt it necessary to provide explicitly in the RPSA that Amtrak is subject to the Freedom of Information Act reflects the fact that Amtrak is not an "agency" subject to FOIA under its own terms. *See* 45 U.S.C. § 546(g) ("The Corporation shall be subject to the provisions of section 552 of title 5."); 5 U.S.C. § 552(f) (defining "agency"). Contrary to petitioner's contention, Amtrak is not subject to the Government in the Sunshine Act because, even if it were an "agency" under § 552(f), it is no longer headed (as it once was) by a board a majority of which is appointed by the President "with the advice and consent of the Senate." 5 U.S.C. § 552b(a)(1). And it does not help petitioner that Amtrak is included in a list of "mixed-ownership Government corporations" subject to certain financial reporting requirements, 31 U.S.C. § 9101(2), or that it is included as a "designated Federal entity" (which is excluded from the definition of a *true* "Federal entity") under the Inspector General Act, 5 U.S.C. app. 2 § 8G(a). Finally, the fact that the Americans with Disabilities Act treats Amtrak as a "public entity," 42 U.S.C. § 12131(1), along with State and local governments (but not the federal government or any of its agencies or entities), does not reflect a congressional determination that Amtrak is part of the United States government. Indeed, the legislative history to the Act specifically notes that *"Amtrak is a private corporation and is not part of the federal government."* H.R. Rep. No. 485(IV), 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 520 (emphasis added).

[18] *See* 12 U.S.C. § 1441a(b)(1)(A) ("There is hereby established a Corporation to be known as the Resolution Trust Corporation

ent in this respect from the entity involved in what petitioner incorrectly calls "[t]he most analogous state action case that this Court has decided," *Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia*, 353 U.S. 230 (1957). Br. Pet. 22. As the name of that entity itself made clear, the Board of Directors of City Trusts *of the City of Philadelphia* was "an agency of the State." 353 U.S. at 231. It was created as an "instrumentality" of the city to "exercise and discharge . . . the duties and powers of said city." Pa. Stat. Ann., tit. 53, § 16365 (1957); *see also id.* § 16370 (board members "shall be considered agents or officers of said city").

2. *This Court Has Held That Amtrak Is Not a Government Entity*

In *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co., supra*, this Court upheld the constitutionality of amendments to the RPSA that required Amtrak's predecessor passenger railroads to reimburse Amtrak for "pass-rider" privileges enjoyed by their employees on Amtrak trains. The railroads had argued that the RPSA, and the Basic Agreements entered into by Amtrak and the railroads pursuant to the RPSA,

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which shall be an instrumentality of the United States"); 7 U.S.C. § 1503 ("[T]here is hereby created as an agency of and within the Department of Agriculture a body corporate with the name 'Federal Crop Insurance Corporation'"), § 1512 (FCIC can act "as a financial agent of the Government"); 29 U.S.C. § 1302(a) ("There is established within the Department of Labor a body corporate to be known as the Pension Benefit Guaranty Corporation"); 12 U.S.C. § 1819(b)(1) (Federal Deposit Insurance Corporation "shall be an agency of the United States" for purposes of district court jurisdictional provision), § 1815(e)(3) (FDIC an agency for purposes of APA judicial review provisions), § 1825(d) (FDIC obligations backed by the "full faith and credit of the United States").

It is appropriate that these entities be treated as government agencies for the additional reason that, unlike Amtrak, they perform governmental functions and do not compete in the private sector. *See* pp. 24-26, *infra*.

"created a contractual obligation on the part of the United States not to reimpose any rail passenger service responsibilities on those railroads that entered into Basic Agreements, and that the pass-rider amendments to the Act *unconstitutionally impair*[*ed*] *the 'contract' into which the United States entered.*" 470 U.S. at 465 (emphasis added). A unanimous Court rejected that argument. Examining the RPSA, the Court concluded:

> By its terms, the Act does not create or speak of a contract between the United States and the railroads, and it does not in any respect provide for the execution of a written contract *on behalf of the United States*. Quite to the contrary, the Act expressly established the National Railroad Passenger Corporation as a nongovernmental entity, 45 U.S.C. § 541, and it used the term "contract" not to define the relationship of the United States to the railroads, but instead that of the new, nongovernmental corporation to the railroads. *Id.* at 467 (emphasis in original).

Accordingly, the Court held that the RPSA was not a contract between the United States and the railroads. *Id.* at 467-69.

Next, the Court considered "whether the Basic Agreements into which the railroads entered with Amtrak grant the railroads a contractual right *against the United States* to be free from all obligation to provide passenger service." *Id.* at 470 (emphasis in original). Again the Court held that the Basic Agreements "do not implicate the United States," because "they are contracts not between the railroads and the United States but simply between the railroads and the nongovernmental corporation, Amtrak." *Id.* at 470-71.[19]

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[19] The railroads argued further that even if the Basic Agreements were contracts between private parties, the pass-rider amendments unconstitutionally impaired a private contractual right. In rejecting that argument, the Court found it necessary to consider the substance of the Agreements. *Id.* at 472-78. Petitioner argues that the Court could have relied on the same analysis to dispose of the argument that the pass-rider amendments impaired a contractual obligation of the United States. Br. Pet. 28 n.39. But the

Thus, this Court explicitly held in the pass-rider case that Amtrak is a "nongovernmental" entity, legally distinct from the United States, whose actions "do not implicate the United States." 470 U.S. at 470-71.[20] Two years ago, the Court again characterized Amtrak as a "private, for-profit corporation" and "not an agency or instrumentality of the United States Government." *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 112 S. Ct. 1394, 1398 (1992). *See also Regional Rail Reorganization Act Cases*, 419 U.S. 102, 152 (1974) (accepting Congress's declaration that similarly structured Conrail is "not . . . an agency or instrumentality of the Federal Government"). Nothing has changed since these decisions to alter Amtrak's character and convert the corporation into a government instrumentality after all.[21]

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fact is that the Court did not do so: the *only* ground on which the Court rejected the argument that Congress had unconstitutionally impaired a contractual obligation of the United States was that Amtrak was not a government entity, but a "nongovernmental" corporation. 470 U.S. at 467, 470. It is not at all clear that the Court would have reached the same result had it been forced to "confront an alleged impairment, by the Government, of its own contractual obligations . . . ." *Id.* at 471. The pass-rider amendments might not have withstood the "more rigorous standard of review" applicable in such cases. *Id.* In any event, what matters is that the Court found it necessary to determine that the Basic Agreements were not contracts of the United States. Contrary to petitioner's contention, that determination was not dictum.

[20] In light of this Court's conclusion that Amtrak's contractual obligations are not those of the United States, it is irrelevant that the Court almost fifty years ago, in a case upon which petitioner relies, held that contractual indebtedness to the Reconstruction Finance Corporation was indebtedness to the United States. *See* Br. Pet. 23 (citing *Cherry Cotton Mills v. United States*, 327 U.S. 536 (1946)).

[21] Amtrak's structure and operations at the time these cases were decided were essentially the same as they are today. The only significant difference is that when the *Atchison, Topeka & Santa Fe* case was decided in 1985, Amtrak relied upon federal subsidies to cover 42% of its operating expenses, as opposed to 18% today. JA 614, 699.

3. *The Lower Courts Have Unanimously Concluded That Amtrak Is Not a Government Entity*

Every other court that has addressed the question whether Amtrak or the similarly structured Conrail[22] is a government entity, or a governmental actor for a particular constitutional purpose, has concluded that it is not. There are at least a dozen decisions by the courts of appeals and district courts to this effect. *See Anderson v. National Railroad Passenger Corp.*, 754 F.2d 202, 204 (7th Cir. 1984) ("The ties between Amtrak and the federal government do not warrant a finding of governmental action for purposes of the fifth amendment."); *Ehm v. National Railroad Passenger Corp.*, 732 F.2d 1250, 1255 (5th Cir.), *cert. denied*, 469 U.S. 982 (1984) (Amtrak not a "Government controlled corporation"); *Wilson v. National Railroad Passenger Corp.*, 824 F. Supp. 55, 57-58 (D. Md. 1992) (Amtrak not a governmental actor); *Railway Labor Executives Ass'n v. National Railroad Passenger Corp.*, 691 F. Supp. 1516, 1524 n.11 (D.D.C. 1988) ("[Plaintiffs] claim Amtrak is a governmental enterprise because it was created by Congress and relies heavily on federal funds. This argument has been uniformly rejected by federal courts and this Court concurs in their analysis."); *Marcucci v. National Railroad Passenger Corp.*, 589 F. Supp. 725, 727-29 (N.D. Ill. 1984) (Amtrak not a governmental actor); *Kimbrough v. National Railroad Passenger Corp.*, 549 F. Supp. 169, 173 (M.D. Ala. 1982) ("Despite the financial controls exerted by the federal government, it is clear

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[22] Both the district court and court of appeals below found Amtrak and Conrail (at the time of the Conrail decisions) to be "similarly structured" for constitutional purposes, Pet. App. 10b, 9a, as have all the other courts that have addressed the issue. *See Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 683 (7th Cir. 1987); *Morin v. Consolidated Rail Corp.*, 810 F.2d 720, 722-23 (7th Cir. 1987). Congress authorized the creation of Amtrak and Conrail as "for profit" corporations to operate, respectively, commercial passenger and freight railroads. *Compare* 45 U.S.C. § 541 *with* 45 U.S.C. § 741; *see also* note 28, *infra*.

that Amtrak was chartered as a for-profit corporation and is to be operated and managed as such. . . . Amtrak is to be considered a private corporation rather than a federal government entity."); *Sentner v. Amtrak*, 540 F. Supp. 557, 560 (D.N.J. 1982) ("Amtrak is not a United States government agency, establishment or instrumentality, and therefore may be subject to liability for punitive damages."); *Moorhead v. National Railroad Passenger Corp.*, No. 81-1579, slip op. at 3-4 (D.D.C. Mar. 9, 1982) (Amtrak not a governmental actor); *Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 683 (7th Cir. 1987) ("Conrail . . . is not an entity of the federal government for purposes of the due process clause."); *G & T Terminal Packaging Co. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1236 (3d Cir. 1987), *cert. denied*, 485 U.S. 988 (1988) ("Every court that has considered the matter has concluded that Conrail is not a governmental actor for purposes of constitutional analysis."); *Morin v. Consolidated Rail Corp.*, 810 F.2d 720, 723 (7th Cir. 1987) ("Conrail, like Amtrak, is not an entity of the federal government for purposes of the due process clause."); *Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 55-56 (2d Cir. 1985) ("[D]espite an obviously close relationship, the federal government has not so far insinuated itself into a position of interdependence with Conrail that the latter's personnel decisions can be considered federal action.") (citation omitted).

In unanimously reaching these conclusions, these courts have considered and rejected virtually all of the arguments petitioner has asserted in this case.

C. There Is No Reason To Revisit Congress's Declaration, and the Courts' Determination, That Amtrak Is a Nongovernmental Entity

Petitioner now attempts to abandon his prior concession and to argue that the Congress and the courts have mislabeled Amtrak. It is important to emphasize the breadth of petitioner's present argument. His position is not simply that the government is responsible for the Amtrak decision at issue in this case. Rather, petitioner's position is that all of Amtrak's business decisions constitute government action because Amtrak is, as a matter of law, part of the government.

Congress has declared repeatedly, however, that Amtrak is not part of the government. Petitioner urges the Court to reject that congressional declaration as a mistake or sham. But it is neither. Congress's declaration was not only a definition of Amtrak's identity; it was an *instruction* that Amtrak and the government are distinct entities and should conduct themselves as distinct entities. Amtrak is not to conduct itself as the government, but "as a for profit corporation," and the government is not to treat Amtrak as an agency of government. Amtrak does not speak or act for the government, and the government is not bound by what Amtrak says or does. In short, Amtrak and the government are related to each other, but they are not one and the same.[23] A consideration of the relevant facts confirms that conclusion.

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[23] None of this is to say that Congress can ultimately determine whether the Constitution applies to a particular action Amtrak takes. If this Court's tests for government action, discussed in Parts II and III of this brief, are met, the Constitution will apply. But Congress ultimately has the power to define the kind of entity that it has created. Having done so in clear and unambiguous terms, Congress's designation of Amtrak as a nongovernmental entity should be accepted absent proof that it was plainly mistaken or engaged in a mere sham. *See, e.g., Negonsott v. Samuels*, 113 S. Ct. 1119, 1122-23 (1993) ("Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive."); *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 548 (1987) ("Deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that the legislative purpose is expressed by the ordinary meaning of the words used.") (citation omitted).

1. *Amtrak Does Not Perform a Traditional Government Function*

Congress authorized the creation of Amtrak as a non-governmental, for-profit corporation because that is precisely what it wanted Amtrak to be, and how it wished the corporation to conduct its affairs. Amtrak does not in any sense "govern"; it runs a commercial railroad.

This is not a case in which the government has conveyed a traditionally public function to a nominally "private" entity in an attempt to circumvent the Constitution or for some other reason. *Cf. Terry v. Adams,* 345 U.S. 461 (1953) (running of state pre-primary elections); *Marsh v. Alabama,* 326 U.S. 501 (1946) (operation of company town). In such circumstances, it may be appropriate to look through the nominally private character of the entity to ensure that the Constitution continues to constrain the performance of "governmental" functions. But there is no similar imperative that the Constitution apply to all the decisions and activities of a commercial railroad.

Petitioner acknowledges that Amtrak does not perform a "traditional public function," but he argues that the corporation's provision of "an essential public service . . . supports a finding of federal action here." Br. Pet. 41. That argument is foreclosed by this Court's precedents. As the Court stated in *Rendell-Baker v. Kohn,* 457 U.S. 830, 842 (1982),

> our holdings have made clear that the relevant question is not simply whether a private group is serving a "public function." We have held that the question is whether the function performed has been "traditionally the *exclusive* prerogative of the State." . . . That a private entity performs a function which serves the public does not make its acts state action. (citations omitted) (emphasis in original).

See also San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 544 (1987).

Neither passenger transportation in general nor rail passenger transportation in particular has "traditionally" been regarded as an "exclusive" governmental function. Rather, as this Court has noted, "[o]peration of passenger railroads, no less than operation of freight railroads, has traditionally been a function of private industry, not . . . government[]." *United Transportation Union v. Long Island Railroad Co.,* 455 U.S. 678, 686 (1982).

Petitioner notes that Amtrak is the only entity today providing intercity rail passenger service. But that hardly establishes that the service provided is governmental in nature. The same could be said of the United States Olympic Committee, which was established by Congress to serve as the "exclusive" national body and "sole authority" performing the important public functions of representing the United States and coordinating U.S. participation in the Olympic and Pan-American Games. *San Francisco Arts,* 483 U.S. at 538 n.17, 534. As in this case, Congress identified an activity that "serve[d] a national interest" and determined that government intervention was required to establish a single entity to take responsibility for that activity. *Id.* at 544. Those facts were not enough to persuade this Court that the functions were traditional governmental functions or that the USOC was a government actor. *See* pp. 35-36, *infra.*

Contrary to petitioner's contention, Amtrak was not established to accomplish "purely governmental purposes." Br. Pet. 23 (quoting *Cherry Cotton Mills v. United States,* 327 U.S. 536 (1946)). Intercity passenger transportation has traditionally been performed by private entities. By its nature, it is a commercial operation, not a regulatory or governmental function.[24] That fact both explains and

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[24] Petitioner's assertion that unlike all other private entities, Amtrak exercises the "traditional sovereign power" of eminent domain, Br. Pet. 9, is wrong in two respects. First, "Amtrak has not been authorized to exercise the sovereign's power of eminent domain. It has been granted a limited power, within the meaning of *United States v. Carmack,* 329 U.S. 230 (1946), to condemn

confirms Congress's determination that Amtrak should be a commercial, not a governmental, entity.

2. *Government Subsidies and Equity Interest Do Not Render Amtrak a Government Entity*

The federal government has provided substantial financial support to Amtrak, but this Court has held repeatedly that "[t]he Government may subsidize private entities without assuming constitutional responsibility for their actions." *San Francisco Arts*, 483 U.S. at 544.[25] Even more clearly, the government may subsidize an entity without making it part of the government.[26]

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land 'required [for] intercity rail passenger service.' 45 U.S.C. § 545(d)(1)(B)." *National Railroad Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1264-65 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987). Second, private railroads (and other private entities) have long possessed such limited condemnation power. *See* 1A J. Sackman, *Nichols' The Law of Eminent Domain*, § 3.231 (rev. ed. 1994) ("Within the limitations of a statutory or constitutional provision delegating the power of eminent domain . . . a railroad company has full capacity to receive and exercise the power of eminent domain.") (citing cases and statutes from 30 states).

Similarly, private railroads other than Amtrak historically have been granted the power to employ their own police. *See, e.g., Russell v. National Mediation Board*, 714 F.2d 1332, 1334 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984) (Atchison, Topeka and Santa Fe Railroad police force); *United States v. Hoffman*, 498 F.2d 879, 880 (7th Cir. 1974) (Penn Central Transportation Company police force); *Cooper-Houston v. Southern Railway Co.*, 822 F. Supp. 715, 717 (N.D. Ga. 1993) (Southern Railway police force). Indeed, in 1975, 41 states by statute permitted the commissioning of special railway police. *See* Dralla, Honig, Port, Power & Simmons, *Who's Watching the Watchman? The Regulation, or Non-Regulation, of America's Largest Law Enforcement Institution, the Private Police*, 5 Golden Gate L. Rev. 433, 474 (1975).

[25] Petitioner emphasizes the amount of Amtrak's subsidies, but the reality is that subsidies today cover only 18% of Amtrak's operating costs. JA 699. Amtrak is considerably less dependent on the government than the nursing homes in *Blum v. Yaretsky*, 457 U.S. 991 (1982), and the school in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). *See* pp. 34-35, *infra*.

[26] The federal government routinely dispenses billions of dollars to private entities that remain distinctly private. Recipients of such financial support include, for example, (1) American farmers, *see, e.g.*, Commodity Credit Corporation, U.S. Dept. of Agriculture, Commodity Estimates Book FY 1995 Mid-Session Review B-1 (July 15, 1994) (documenting $11 billion paid to American farmers in FY 1993 in the form of loans and direct cash payments), (2) the airline industry, *see, e.g.*, Pub. L. No. 102-388, 106 Stat. 1520, 1526 (1993) (appropriating $2 billion for airport planning and development), and (3) the Chrysler Corporation, *see* Pub. L. No. 96-185, 93 Stat. 1324, 1331 (1979) (authorizing up to $1.5 billion in loan guarantees to save the troubled auto maker). American Airlines, Chrysler and the American farmer are obviously not government entities.

Nor does the fact that the federal government has acquired an equity interest in exchange for its financial assistance convert the ~~corporation into~~ the government. It is elementary that "the corporation is an entity distinct from the shareholders." 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 25, at 512 (rev. ed. 1990). This truism applies "whether the corporation has many stockholders or only one." *Id.* at 514. It also applies when the government is the sole shareholder. "National banks and other national corporations, including those which are government-owned, are distinct entities." *Id.* at 513. Thus, Amtrak and the United States remain legally distinct, notwithstanding that the government holds Amtrak's preferred stock. *See Bank of the United States v. Planters' Bank of Georgia*, 22 U.S. 904, 907 (1824) (Marshall, C.J.) ("The State does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the State holds an interest in it."); *cf. National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 190 (1988) (NCAA a private actor even though "many NCAA member institutions [a]re either public or government supported.").

Indeed, the federal government's ownership of Amtrak's preferred shares reflects an important distinction between the corporation and government entities. Prior to 1981, Amtrak received financial subsidies primarily in the form of outright grants. As part of the Amtrak Im-

provement Act of 1981, Congress demanded, as a condition of future financial support, that Amtrak convey to the United States preferred stock equal in par value to all past and future federal appropriations. Pub. L. No. 97-35; 45 U.S.C. § 544(c). These shares carry cumulative dividends of not less than six percent per annum, which must be paid in full prior to the declaration of any common share dividends. 45 U.S.C. § 544(a)(B)(i). Thus, the government's accumulation of preferred shares provides a basis for it to receive some return on its investment. By contrast, Congress dispenses money to federal agencies and entities not with the requirement or expectation that these funds be repaid in whole or in part, but simply because these entities are part of the government.

3. *The Composition of Amtrak's Board of Directors Does Not Render Amtrak a Government Entity*

Petitioner argues that the federal government's authority to appoint all but one of Amtrak's directors supports a finding that Amtrak is a government entity. Government officials, however, do not have unfettered discretion to appoint whomever they desire. Two of the directors appointed by the President are selected from a list compiled by commuter authorities; one is selected from a list compiled by the Railway Labor Executives Association, a labor organization; one is selected from among governors of states with an interest in rail transportation; and one is selected as a representative of business with an interest in rail transportation. *See* 45 U.S.C. § 543.

More importantly, with the exception of the Secretary of Transportation and one governor, Amtrak's board members are not public officials or employees. They are private citizens, appointed to serve specified terms. Unlike government employees, Amtrak's board members do not take an oath of office. *Cf.* 5 U.S.C. § 3331 (1988). Rather, Amtrak's directors—like the directors of any other private corporation—assume a fiduciary duty to the

corporation and its shareholders, common and preferred.[27] That duty is not to operate Amtrak as part of the government, but "as a for profit corporation." 45 U.S.C. § 541. It is not to discharge a governmental function, but to oversee a commercial one. The board's duty is to maximize revenues and minimize costs, so as to protect the economic interests of all of the corporation's investors. It is, in short, the duty of a corporate director, not that of a government official.

This Court has considered—and rejected—precisely the same argument that petitioner advances here in a case involving the similarly structured Conrail. In the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 152 (1974), the Court ruled that Conrail is not a "federal instrumentality" for constitutional purposes "by reason of the federal representation on its board of directors."[28] In that case, parties with interests in the Penn Central Transportation Co. ("Penn Central") challenged the 3-R Act, pursuant to which Conrail received certain rail properties from other railroads in exchange for Conrail stock and other payments. Penn Central argued, *inter alia*, that because Conrail was a "federal instrumentality," the statute constituted an unconstitutional

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[27] *See, e.g., Wisconsin Avenue Associates, Inc. v. 2720 Wisconsin Avenue Cooperative Ass'n*, 441 A.2d 956, 962 (D.C.), *cert. denied*, 459 U.S. 827 (1982) ("Officers and directors of a corporation owe a fiduciary duty to the corporation and to its shareholders, which requires them to act in good faith in managing the affairs of the corporation."); *see generally* 3 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 837.50 (rev. ed. 1994).

[28] Of Conrail's 15 directors, five were appointed directly by the President, one was the Secretary of Transportation, and two were the chairman and president of the United States Railway Association (created as a "government corporation," 45 U.S.C. § 711(c)). *See* 419 U.S. at 152 & n.40. The chairman of the USRA was appointed by the President, with the advice and consent of the Senate. *See* Pub. L. 93-236, 87 Stat. 985, 988 (1974). The president of the USRA was appointed by the directors of the USRA (all of whom were appointed directly by the President), upon the recommendation of the Secretary of Transportation. *Id.* at 989.

"exercise of eminent domain power." 419 U.S. at 149. This Court disagreed:

> [I]t is contended that despite the express provision of § 301(b) that Conrail "shall not be an agency or instrumentality of the Federal Government," . . . federal participation through federally appointed members of the board of directors constitutes Conrail a federal instrumentality. . . . *But Conrail is not a federal instrumentality by reason of the federal representation on its board of directors. . . . The responsibilities of the federal directors are not different from those of the other directors—to operate Conrail at a profit for the benefit of its shareholders.* 419 U.S. at 152 (emphasis added) (citation deleted).

Accordingly, the Court concluded that "Conrail will be basically a private, not a governmental, enterprise." *Id.*

There is no distinction between the responsibilities of the Conrail directors in the *Regional Rail Reorganization Act Cases* and the Amtrak directors in this case. Nor should there be any difference in the conclusion to be drawn. The presence of federally appointed directors does not transform Amtrak into a "federal instrumentality" or a "governmental" enterprise. *Id.*

4. The Government Is Not Involved in Amtrak's Day-to-Day Operations

Petitioner argues, in effect, that this Court should "pierce the corporate veil" that surrounds Amtrak and declare that its actions should be treated in all respects as the actions of the United States, its preferred shareholder. In the corporate world, however, neither 100% stock ownership nor the concomitant power to select directors is sufficient to pierce the corporate veil between a parent and a subsidiary. And neither should those facts suffice here.

The test for determining whether a corporate veil should be pierced is whether the parent or stockholder exercises "control, not merely majority or complete stock control, but complete domination, not only of the finances, but of policy and business practice in respect to the transaction so that the corporate entity as to this transaction had at the time no separate mind, will, or existence of its own . . . ." 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 41.10, at 616 (rev. ed. 1990). That test, like the "close nexus" test discussed in Part II of this brief, focuses on the exercise of actual control over the particular transaction at issue, not mere ownership or resulting ability to control in general.

The extreme argument offered by the petitioner—that the corporate veil should be pierced for all corporate actions—necessarily requires proof of more extensive involvement, not less, than would be required to support a finding of government responsibility for a single transaction. If the government is to be held responsible for all of Amtrak's actions, there should be proof that the government is involved generally and pervasively in the day-to-day operations of the company, and that it in fact exercises "complete domination" of all of the company's business activities. *Id.* It clearly does not.

Amtrak's day-to-day operations and business practices do not differ in any relevant respect from those of the railroads Amtrak succeeded, or from those of the airlines and bus companies with which Amtrak competes. Amtrak runs a railroad and does so without involvement by the federal government in its daily operations. As several lower courts have found, "Amtrak's daily operation is not subject to close government supervision; nor are Amtrak's daily affairs conducted by federal employees." *Anderson v. National Railroad Passenger Corp.*, 754 F.2d at 204; *see also Ehm v. National Railroad Passenger Corp.*, 732 F.2d at 1255 ("Amtrak's day-to-day operations are not subject to close government supervision. The officers and employees who conduct Amtrak's day-to-day affairs are not federal employees."); *cf. Myron v. Consolidated Rail Corp.*, 752 F.2d at 55 ("despite federal funding, regulation, stock ownership and representation on the board of directors, there is nothing resembling federal supervision of [Conrail's] day-to-day activities").

In sum, Amtrak functions as Congress intended it to function—as a for-profit corporation without substantial government involvement. It is with good reason, therefore, that this Court and the lower courts—and, until now, the petitioner—have resisted the suggestion that Amtrak is part of the government.

At most, petitioner's arguments establish that the government, by virtue of its relationship with Amtrak, may have the opportunity to attempt to influence Amtrak's business decisions. But that observation only frames the real question in this case: whether the government in fact influenced the particular decision that has been challenged as violating the Constitution. In the final analysis, petitioner's new argument, attempting to characterize Amtrak itself as the government, is nothing more than a desperate effort to avoid confronting that question.

II. THE GOVERNMENT DID NOT INFLUENCE AMTRAK'S DECISION TO REJECT PETITIONER'S POLITICAL AD

A. The "Close Nexus" Test

The question whether the government is responsible for the challenged conduct of a nongovernmental entity can be answered only by examining the nature of the government's involvement in that conduct. "[T]here must be cautious analysis of the quality and degree of Government relationship to the particular acts in question." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 115 (1973). "The complaining party must . . . show that 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.'" *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (*quoting Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)).

The requisite "close nexus" has been defined as follows: "Most fundamentally, this Court has held that a government 'normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government].'" *San Francisco Arts*, 483 U.S. at 546 (quoting *Blum*, 457 U.S. at 1004).

This focus on the "close nexus between the State and the challenged action" ensures that regardless of how minimal the government's involvement with the entity, constitutional standards will apply if that involvement caused the alleged deprivation. But it also ensures that regardless of how extensive or detailed the government's involvement with the entity, constitutional standards will not apply if that involvement did not affect the challenged action.[29] Conduct for which the government is truly "*responsible*," *Blum*, 457 U.S. at 1004 (emphasis in original), will be subject to constitutional constraints, but conduct that is not influenced by the government will not. This precise focus, directed at the government's influence on the challenged action, both protects individual rights from government infringement and gives effect to another "great object of the Constitution"—"permit[ting] citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991).

Petitioner seeks to avoid the "close nexus" analysis by treating it as applicable only to the actions of purely private entities. As demonstrated below, however, the analysis has been applied to entities that are created by the government, that are dependent upon the government for funding, that are extensively regulated by the government,

[29] *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (finding no government action because, "in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters"); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-77 (1972) (finding no government action because, "[h]owever detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination").

and that serve important public interests. Almost by definition, none of those entities was purely private; all were quasi-public and all were subject to varying degrees of government control or influence. In each case, however, the dispositive question was whether the government had exercised control or influence, overtly or covertly, over the particular action that was challenged.

In *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), for example, the Court declined to find a close nexus between the State and the employment termination decisions of a school that contracted with the State to provide special education services to public school students. The school served an important "public function" by providing services that the State was required by statute to make available to students with special needs. 457 U.S. at 842; *see id.* at 831 n.1. The school was extensively regulated and heavily dependent on a variety of public funding arrangements: public funds accounted for at least 90%, and in one year 99%, of the school's operating budget. *Id.* at 832, 840-41. The State had even become involved to a limited degree in the school's employment decisions. The discharged vocational counselor had been hired under a federal grant distributed through the State Committee on Criminal Justice, and as a condition of the grant the State Committee had to approve the school's initial hiring decision. When the counselor was fired, she complained to the State Committee, which asked the school to provide a written explanation. The State Committee later said that it was satisfied with the explanation and told the counselor that although it had no authority to order a hearing on her termination, it "would refuse to approve the hiring of another counselor if the school disregarded its agreement to apply its new grievance procedure in her case." *Id.* at 834.

Notwithstanding these facts, which showed extensive involvement of the State generally in the affairs of the school, the Court found government action lacking in the case, because the government had neither coerced nor encouraged the particular decisions at issue:

> Here the decisions to discharge the petitioners *were not compelled or even influenced* by any state regulation. Indeed, *in contrast to the extensive regulation of the school generally*, the various regulators showed relatively little interest in the school's personnel matters. *Id.* at 841 (emphasis added).

Likewise, in *Blum v. Yaretsky, supra*, the Court applied the "close nexus" test to hold that the State was not responsible for decisions to transfer Medicaid patients from their nursing homes. Again, the nursing homes were "extensively regulated," they performed an important public function in carrying out the State's Medicaid program, and they received substantial government subsidies of their operating and capital costs. 457 U.S. at 1004, 1011. But those facts did not eliminate or alter the requirement of a close nexus between the government and the challenged transfer decisions. Nor was that requirement met by proof that "the State was indirectly involved in the transfer decisions," in the sense that it "encouraged the nursing homes to transfer patients to less expensive facilities when appropriate." *Rendell-Baker*, 457 U.S. at 841. This "indirect involve[ment]" and "encourage[ment]" were insufficient to make the government "*responsible*" for the particular transfer decisions at issue, because the State had not " 'affirmatively command[ed]' the summary discharge or transfer of Medicaid patients," it had not established the standards by which the nursing homes' decisions were made, and the decisions were neither made nor reviewed by the government. *Blum*, 457 U.S. at 1005, 1008, 1010 (emphasis in original).

The Court undertook the same "close nexus" analysis —and again found government action lacking—in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, supra*. In that case, the plaintiff argued that the USOC had violated the Fifth Amendment by discriminating in the enforcement of its right, conferred by Congress, to exclusive use of the word "Olympic." The USOC was hardly a purely private entity. It was created by Congress to "serve a national interest"—by " 'correct-

[ing] the disorganization and the serious factional disputes that seemed to plague amateur sports in the United States,' " and by " 'represent[ing] this Nation to the world community.' " 483 U.S. at 544, 545 n.27 (citations omitted). Congress "gave the USOC authority and responsibilities that no private organization in this country had ever held." *Id.* at 557 (Brennan, J., dissenting). Of particular significance to the case, Congress provided for funding of the USOC not only by authorizing direct grants, but also by conferring the right to exclusive use of the Olympic word and symbol. *Id.* at 543.

The Court held, however, that the Constitution did not restrict the USOC's choice of how to enforce the exclusive right conferred by Congress, because there was "no evidence that the Federal Government *coerced or encouraged* the USOC in the exercise of its right." *Id.* at 547 (emphasis added). "Absent proof of this type of '*close nexus between the* [*Government*] *and the challenged action of the* [*USOC*],' " the Court held, "the challenged action may not be 'fairly treated as that of the [Government] itself.' " *Id.* at 547 n.29 (emphasis added) (citation omitted).[30]

As these cases demonstrate, the "close nexus" standard is the appropriate standard to be applied when the argument is advanced, as it is in this case, that government involvement renders the actions of a corporation—even a corporation with a quasi-public character—government action subject to the constraints of the Constitution.

[30] The Court also noted that there was no evidence that the government "*can* or does exert influence over the exercise of the USOC's enforcement decisions." *Id.* (emphasis added). But that factual observation should not be understood to mean that the mere *potential* for influence is enough to support a finding of government action. What is required is proof that the government "has exercised coercive power or has provided . . . significant encouragement, either overt or covert . . . ." *Id.* at 546. In any event, it is true here, as it was in *San Francisco Arts*, that "neither [the President] nor Congress could control the [entity's] actions directly." *Id.* at 546 n.27.

B. Petitioner Cannot Establish a Close Nexus Between the Government and the Challenged Action

Under the "close nexus" standard, neither Amtrak's prohibition against political advertising in general nor its decision to reject petitioner's political ad in particular can fairly be attributed to the United States government. No federal regulation compelled or influenced these decisions: there are no federal regulations applicable to Amtrak's advertising. No federal official or entity "exercised coercive power" or provided "significant encouragement" in the formulation of Amtrak's policy against political advertising or in the application of that policy to petitioner's ad. The decision to reject petitioner's ad was made for purely commercial reasons by the Amtrak employee responsible for the company's real estate operations. The federal government played no role whatsoever, overt or covert, in that decision.

Petitioner contends that a sufficient nexus exists between the United States and the decision to reject his advertorial because Amtrak's board of directors, which is largely appointed by the President or the Secretary of Transportation, is "responsible for the very rule of decision that [he] challenges." Br. Pet. 39. That argument is wrong for the simple reason that Amtrak's board of directors is not the United States. Only one of Amtrak's board members is a federal official. And as this Court found with respect to Conrail's board in the *Regional Rail Reorganization Act Cases, supra*, the responsibilities of Amtrak's federally appointed directors are no different from those of the directors of any other corporation—"to operate [Amtrak] at a profit for the benefit of the shareholders." 419 U.S. at 152. The decisions of Amtrak's board of directors are not the decisions of the federal government. It therefore adds nothing to petitioner's argument to suggest that this was a board policy, as opposed to a company policy.

If, however, it were considered relevant to know the degree to which the board participated in the formulation or implementation of Amtrak's policy against political

advertising, the answer is: not at all. The policy originated with Amtrak's predecessor, the Pennsylvania Railroad Company (an emphatically private, although unprofitable, entity), years before Amtrak existed. JA 326. Amtrak's officers and employees simply continued this prudent business practice, without board involvement, when Amtrak assumed ownership of Penn Station.

The board of directors did not make the decision to reject petitioner's advertorial. Amtrak's policy prohibiting political advertising is applied by the Vice President of its Real Estate and Operations Development Department, Anthony DeAngelo. He made the decision to reject petitioner's ad, without consulting Amtrak's board. JA 35-36, 122-24; C.A. App. 355-56, 365, 373-74; Pet. App. 5a.

Petitioner no longer argues, as he did in support of his petition for certiorari, that "the record demonstrates that Amtrak's Presidentially-appointed Board explicitly adopted the policy against political advertising." Reply Mem. 3. Instead, he now contends that the board must have known about—and acquiesced in—the policy against political advertising, because it is "reflected in several contracts between Amtrak and its advertising leasing agent, each of which had to be approved by the Board." Br. Pet. 35. Notably, however, petitioner fails to identify a single contract containing the policy that was approved by the board.

The record demonstrates only that Amtrak's board of directors authorized a single agreement, in 1991, between the corporation and TDI, a leasing company. As petitioner correctly noted in the district court, however, "the 1991 Agreement . . . contained no reference to political advertising." JA 171 (Plaintiff's Pre-Trial Proposed Findings of Fact, ¶ 71). The 1991 contract provided simply that advertising material "shall be subject to approval by Amtrak." JA 204. And there is no evidence that the board even reviewed and approved that language. Amtrak's board minutes concerning the 1991 agreement reveal that the board prospectively "authorized [Anthony DeAngelo] to execute any and all documents on behalf of

the Corporation" necessary to grant licenses to TDI. JA 402.[31] Amtrak and TDI did not execute such an agreement until more than a month later. JA 219. Thus, the record shows only that the board prospectively authorized the 1991 contract, which it never saw, and which did not contain any reference to the challenged policy.

Petitioner argues that the board must also have authorized a 1980 leasing agreement between Amtrak and TDI, which contained a provision reserving Amtrak's right to reject "political" advertising. JA 261. There is no evidence, however, that the board reviewed or approved either this language or the 1980 agreement as a whole. Petitioner contends that "[w]hile discovery did not include Board minutes back to 1980," the board authorized the 1991 agreement and, "under the presumption of regularity, is presumed to have acted similarly with respect to the 1980 contract." Br. Pet. 35 n.50. It is important to note, however, that discovery did not "include" the 1980 minutes because petitioner never requested them,[32] and the evidentiary record does not include those minutes because petitioner never argued that the board approved the policy against political advertising, much less the 1980 agreement.[33] Having failed to create a record that sup-

[31] As Anthony DeAngelo explained, such

> contracts are approved by me. What I do is go to the board with a—let's say it is a lease of a piece of property along a right of way. I will tell them that we intend to lease the property under certain conditions and they will approve that, *but they will never see the contract or any of the details of the contract.* JA 25 (emphasis added).

[32] *See* JA 585 (requesting production of "[c]opies of the minutes of the Board of Directors or Board committee meetings at which Amtrak's advertising policy or any Amtrak/TDI contract was considered, *back through and including 1985*") (emphasis added). Amtrak fully complied with petitioner's discovery request. *See* JA 589.

[33] Petitioner's argument below was not that board approval of the policy against political advertising constituted government action. Rather, petitioner argued, on the merits, the inconsistent position that there was no policy against political advertising adopted by anyone. *See, e.g.*, C.A. App. 1319 (Plaintiff's Pre-Trial

ports his arguments in this Court (arguments that he did not make to the courts below), petitioner should not be permitted to offer unsubstantiated arguments about what the record might have shown.[34]

Even if, however, the board were "presumed to have acted similarly with respect to the 1980 contract," as petitioner now argues, the board's procedure in 1991, which was perfectly "regular," was to give advance authorization to an agreement based on its general scope, without ever seeing the subsequent contract or learning its details. A presumption that the board acted similarly in 1980 would not establish that Amtrak's board approved, or even knew about, the policy prohibiting political advertising.

We present this somewhat lengthy discussion of the record to respond to petitioner's ever-changing arguments concerning the board's role. The principal point, however, is that Amtrak's board of directors is not, any more than Amtrak itself, the government, and that a nexus between the board and the policy at issue does not establish government action.

Petitioner also argues that a sufficiently close nexus exists between the United States and the conduct he challenges because Congress's "mandate that Amtrak . . . maximize revenue" "encouraged" the decision to reject his advertorial. Br. Pet. 39. That argument—which is reminiscent of an argument rejected in *Blum*, *see* p. 35, *supra*—proves too much. Virtually *all* of Amtrak's activities are directed toward "maximiz[ing] revenue." That

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Proposed Conclusions of Law, ¶ 43 ("Nothing in TDI's contract with Mr. Lebron states that advertising will be rejected if deemed political. Nor does anything in Amtrak's multiple agreements with TDI so provide.")); Brief for Michael A. Lebron in the Court of Appeals, at 35 ("As far as the record demonstrates, this 'policy' exists only in DeAngelo's mind."); *id.* at 42 (Amtrak's policy "frankly appears to have been created for this case:").

[34] It is only because the 1980 board minutes are not part of the record that we do not discuss them. If petitioner had argued below that board approval of the 1980 contract was at all relevant, Amtrak would have gladly offered the minutes into evidence.

fact does not transform all of the corporation's business decisions into government actions. The government did not instruct or encourage Amtrak to maximize revenue by rejecting paid political ads.

In sum, no "close nexus" exists between the United States government and Amtrak's decision to reject petitioner's advertorial. Amtrak's decisions to disassociate itself from political advertising in general and to reject petitioner's political attack ad in particular were prudent corporate decisions made by the operators of a commercial railroad in the exercise of their business discretion. Those decisions were not the product of government coercion, encouragement, or influence.

III. THE GOVERNMENT'S INACTION IN THIS CASE DOES NOT AMOUNT TO GOVERNMENT ACTION

Petitioner argues that even if Amtrak is not a government entity, and even if the United States did not coerce, encourage or influence Amtrak's decision to reject his political ad, the government's relationship with Amtrak is such that it bears responsibility for that decision nevertheless—in effect, that under the circumstances the federal government's *inaction* amounts to government action. For this argument, petitioner relies upon this Court's decision in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). But *Burton* does not support any such argument in this case.

In *Burton*, this Court held that the Fourteenth Amendment prohibited the exclusion of black persons from a restaurant that leased space in a public building. The building was built, owned and maintained by the State, and was used primarily to house a public parking garage. The Court noted that "the commercially leased areas . . . constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit"—and that "profits earned by discrimination [in the restaurant] not only contribute to, but also are indispensable elements in, the

financial success of a government agency." 365 U.S. at 723-24. Against that factual background, the Court found "that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn." *Id.*

The Court explained that "*no State may effectively abdicate its responsibilities*" to avoid the "grave injustice" of excluding blacks from a "public building"—"either by ignoring [those responsibilities] or by merely failing to discharge them whatever the motive may be." *Id.* at 724-25 (emphasis added). The State Parking Authority, the Court noted, "could have affirmatively required" in the lease that the restaurant ensure access to the public building on a nondiscriminatory basis. "*By its inaction,*" the Court concluded, "*the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.*" *Id.* at 725 (emphasis added).

Recognizing the potentially far-reaching impact of a holding that government inaction is tantamount to government action—or even a holding that the conferral of mutual benefits transforms government inaction into government action—the Court was careful to "[s]pecifically defin[e] the limits" of its holding:

> what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself. *Id.* at 726.

In other words, the government's failure to insist upon a covenant of nondiscrimination violates the Fourteenth Amendment when the lease of public property occurs in a setting in which the leased property is an integral part of a public building devoted to a public service and an indispensable element in the financial success of the government agency that operates the service.

Petitioner argues that the holding in *Burton* should be extended to cover this case—in effect, that government's failure to prevent the challenged action of a nongovernmental entity will always be regarded as government action whenever the government and nongovernmental entity are in a position of interdependence.[35] But *Burton* does not stand for that broad proposition. *Burton* was a case of racial discrimination. Its reasoning was explicitly dependent on the nature of the government's affirmative "responsibilities under the Fourteenth Amendment," and its holding was expressly limited to "the proscriptions of the Fourteenth Amendment." *Id.* at 725, 726.

Even in cases involving racial discrimination, the Court has limited *Burton* to its facts and refused to find government action where the facts were less compelling. *See, e.g., Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172-75 (1972). And it has never extended *Burton*'s inaction, or "abdication," theory outside the context of racial discrimination, as the petitioner proposes.[36]

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[35] For obvious reasons, petitioner has not chosen to articulate his argument as one of government action premised on inaction or abdication of responsibility. But that is precisely what his argument amounts to—a claim that even in the absence of any government influence over the decision at issue, its inaction or acquiescence amounts to government action because of a general symbiotic relationship between Amtrak and the government.

[36] The Court quoted *Burton* in *Edmonson v. Leesville Concrete Co., supra*, but not for the proposition that inaction in the context of a symbiotic relationship amounts to government action. In that case, the Court held that the exercise of peremptory challenges constituted government action because peremptory challenges could not be exercised without "the overt, significant assistance of the court," and because they involved the "performance of a traditional function of the government." 500 U.S. at 624. The Court's citation to *Burton* was in the following context:

> Without the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose. By enforcing a discriminatory peremptory challenge, the Court "has not only made itself a party to the [biased act], but has elected to place

Thus, in *San Francisco Arts, supra,* the Court explicitly rejected the argument that the government should be viewed as a "joint participant" under *Burton* in decisions by the USOC that were alleged to have been based on sexual orientation, because the plaintiff had "failed to demonstrate that the Federal Government can or does exert any influence over" those decisions. 483 U.S. at 547 n.29. "At most," the Court explained, "the Federal Government, by failing to supervise the USOC's use of its rights, can be said to exercise '[m]ere approval of or acquiescence in the initiatives' of the USOC. . . . This is not enough to make the USOC's actions those of the Government." *Id.* at 547 (quoting *Blum,* 457 U.S. at 1004-05); *see also Blum,* 457 U.S. at 1010-11 (rejecting "the rather vague generalization," supported by citation to *Burton,* that State's close relationship to nursing homes made it a "joint participant" in their decisions); *Rendell-Baker,* 457 U.S. at 842-43 (declining to apply *Burton*).

There is serious doubt whether *Burton*'s inaction, or "abdication," theory should be extended beyond the equal protection context in which it was articulated. "Inaction" may be a "classic . . . way of 'denying [equal] protection.' "[37] But it is far from clear that inaction can be regarded as violating other constitutional provisions that do not impose affirmative obligations, but rather impose limitations on the government's power to act. *See, e.g., DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 195 (1989) (due process clause is a "limitation on the State's power to act" and imposes no "affirmative obligation" to protect child from abusive father); *Flagg Brothers, Inc. v. Brooks,* 436 U.S. 149, 164-66 (1978) (State's refusal to block sale of bailor's goods not a violation of due process clause).

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its power, property and prestige behind the [alleged] discrimination." *Id.* (quoting *Burton,* 365 U.S. at 725).

Edmonson is thus not a case of government inaction, but of overt government action.

[37] Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14,* 81 Harv. L. Rev. 69, 73 (1967).

Regardless of whether inaction could ever be regarded as violating some other provision of the Constitution, it is clear that the First Amendment "is not as amenable as the Fourteenth Amendment is to the construction that there is state action by inaction." *Edwards v. Habib,* 397 F.2d 687, 693 (D.C. Cir. 1968) (Wright, J.), *cert. denied,* 393 U.S. 1016 (1969).[38] To illustrate that point, one need only consider the facts of *Burton* itself. It seems clear that the Court would not have found government action in *Burton* if the Eagle Coffee Shoppe had declined to lease space above its lunch counter to display a political ad, and if the constitutional challenge had been a First Amendment one. The reason for the different result in such a case is not that the First Amendment is somehow less important than the Fourteenth Amendment's equal protection guarantee. The reason is that these constitutional rights are implicated in different ways in the two cases, and the government's role in protecting these constitutional rights is fundamentally different.

If the Eagle Coffee Shoppe had reserved its walls for speech of its own choosing, it would have been exercising its free-speech right, and the First Amendment would have protected its exercise of that right from government interference. *See, e.g., Pacific Gas & Electric Co. v. Public Utilities Commission,* 475 U.S. 1, 9 (1986); *Wooley v. Maynard,* 430 U.S. 705, 713 (1977); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974). But the Eagle Coffee Shoppe had no constitutional right to discriminate, and the Constitution did not protect its discrimination from government interference.[39] To the

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[38] *See also Powe v. Miles,* 407 F.2d 73, 81 (2d Cir. 1968) (Friendly, J.) (holding that "state inaction" in failing to oversee university's demonstration guidelines is not subject to First Amendment attack, but noting that inaction in the face of discriminatory admission policies would present a "different question").

[39] "[A]lthough the Constitution does not proscribe private bias, it places no value on discrimination. . . . Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never

contrary, because racial discrimination is regarded as a singular evil, the government's inaction could be regarded, under the circumstances in *Burton*, as an "abdicat[ion]" of its affirmative "responsibilities under the Fourteenth Amendment" to ensure equal protection of the laws. 365 U.S. at 725.[40]

It is entirely sensible to say that under some circumstances the Fourteenth Amendment's equal *protection* guarantee obligates the government to *protect* its citizens from racial discrimination by its tenants on its property,[41] but the First Amendment neither obligates nor permits

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been accorded affirmative constitutional protections." *Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973).

[40] The state-action doctrine reflects the profound judgment that denials of equal treatment, and particularly denials on account of race or color, are singularly grave when government has or shares responsibility for them. Government is the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct. Therefore something is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in racial discrimination. Accordingly, in the cases that have come before us this Court has condemned significant state involvement in racial discrimination, however subtle and indirect it may have been and whatever form it may have taken. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 190-91 (1970) (Brennan, J., concurring and dissenting).

Precisely for these reasons, at least five Circuits have explicitly recognized that state action may be found more readily when the challenged action involves racial discrimination. *See, e.g., Parks v. "Mr. Ford,"* 556 F.2d 132, 137 (3d Cir. 1977); *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1114 n.6 (9th Cir. 1975); *Greenya v. George Washington University*, 512 F.2d 556, 560 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975); *Fletcher v. Rhode Island Hospital Trust National Bank*, 496 F.2d 927, 931 (1st Cir.), *cert. denied*, 419 U.S. 1001 (1974); *Wahba v. New York University*, 492 F.2d 96, 100 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974); *Grafton v. Brooklyn Law School*, 478 F.2d 1137, 1142 (2d Cir. 1973); *Powe v. Miles, supra.*

[41] "[T]he Reconstruction Amendments were enacted with a particular purpose in mind: to eradicate forever the vestiges of slavery and the black codes." *Edwards v. Habib*, 397 F.2d at 693.

the government to police its tenants' speech. In fact, the notion of the government's "abdicating" such a "responsibility" is wholly foreign to our First Amendment discourse. We do not speak, in this country, of the government's having, and then abdicating, a responsibility to police the speech of nongovernmental entities.

And so, it *is* relevant in this case that the decision under attack is not a decision to engage in racial discrimination, but a decision by a nongovernmental entity to limit the speech on its premises to commercial speech. The government has no obligation to interfere with such a decision, but rather an obligation to leave such a decision alone. And its inaction in the face of such a decision does not even potentially violate the First Amendment; it vindicates the command of the First Amendment that government shall not interfere with freedom of speech.

Thus, in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973), this Court held that a broadcaster's refusal to accept editorial advertisements was not government action for purposes of First Amendment analysis, notwithstanding the fact that the broadcaster was operating pursuant to a government license as a "public trustee" subject to the oversight of the Federal Communications Commission. *Id.* at 118. It was dispositive that "the Commission has not fostered the licensee policy challenged here; it has simply declined to command particular action because it fell within the area of journalistic discretion." *Id.* Like the government in this case, it "merely permitted or failed to prohibit such acts." *Id.* at 119. In the First Amendment area, such inaction does not constitute government action subject to constitutional attack.[42]

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[42] None of the cases cited by the petitioner is inconsistent with this analysis. The four cases that explicitly reject or question differential state action standards did not involve First Amendment claims. Only three of the cases that petitioner claims implicitly reject a differential standard involved First Amendment claims—*Milo v. Cushing Municipal Hospital*, 861 F.2d 1194 (10th Cir. 1988); *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987); and

In sum, the government does not have a constitutional responsibility to police all of the actions of an entity with which it has a "symbiotic" or other close relationship, and the existence of such a relationship does not automatically transform all of the nongovernmental entity's actions into government action. Even petitioner acknowledges at the outset of his argument that the existence of a symbiotic relationship cannot support a finding of government action "for all purposes," but only for "specific conduct." Br. Pet. 18; *see also id.* 31. But petitioner offers no standard that can be used to determine which specific conduct should be attributed to the government. The only standard that might be gleaned from petitioner's brief is whether the decision at issue had financial consequences to the nongovernmental entity and, indirectly, to the government. But that standard would have resulted in a finding of government action in *Blum*, where the state benefited from the transfer decisions at issue. *See* p. 35, *supra*. It would have resulted in a determination in *Burton* that all of the Eagle Coffee Shoppe's business decisions were subject to constitutional attack. And, contrary to petitioner's acknowledgment at the outset of his argument, it would (assuming the existence of a "symbiotic relationship") subject all of Amtrak's business decisions to constitutional scrutiny. *Compare* Br. Pet. 18 (noting that "symbiotic relationship" theory would be limited to "specific conduct") *with* Br. Pet. 39 n.53 (noting that all employment decisions, and therefore presumably all business decisions, would be covered by the theory).

Burton itself suggests a more limited test of government responsibility—whether under the particular circumstances, the constitutional provision that is invoked can be said to impose an affirmative duty to act, such that inaction can be deemed an abdication of a constitutional duty. That was true in *Burton*, and it is not true here.

Krynicky v. University of Pittsburgh, 742 F.2d 94 (3d Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985)—and those claims were fundamentally different from the claim in this case. In those cases, the plaintiffs alleged that their firings were in retaliation for their speech. Unlike Amtrak in this case, the employers could claim no speech-related interest; they in fact denied that speech had anything to do with their decisions. Thus, the First Amendment did not even arguably protect the challenged conduct in those cases from government interference.

IV. THE COURT SHOULD DISREGARD PETITIONER'S PARADE OF HORRIBLES

Petitioner presents a parade of horribles that he says could ensue if Amtrak's advertising policies are not subjected to First Amendment scrutiny as if they were the government's. But petitioner's imagination should not distort the analysis of the constitutional issue in this case. As Justice Frankfurter once cautioned, "[t]he process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world . . . ." *New York v. United States*, 326 U.S. 572, 582 (1946).

Petitioner suggests that if Amtrak is not treated as the government, it could discriminate against certain viewpoints in the leasing of advertising space—offering, for example, to sell space only to the incumbent during a Presidential campaign. That suggestion is indeed ironic, for the policy under attack here is to avoid such controversies by refraining from leasing advertising space in Penn Station for any political message. If, however, Amtrak were to reverse its long-standing and sound business policy against political advertising, and then yield to government coercion or influence, the courts could discern this and find government action under a "close nexus" theory. But absent such coercion or influence, there would be no reason to invoke the Constitution.[43]

Petitioner also offers the preposterous suggestion that if Amtrak is freed from constitutional scrutiny, it could discriminate on the basis of race, gender or religion. But rejection of petitioner's claim here would not necessarily preclude a finding of government action on a *Burton*

[43] If the concern is that government funds might be misused for purposes other than those for which they were intended, Congress is not powerless to act. *See, e.g., Rust v. Sullivan*, 500 U.S. 173 (1991).

"abdication" theory if, for example, Amtrak were to start segregating its trains. Nor, of course, could Amtrak engage in such conduct without violating federal and state civil rights statutes.

This case should not be decided based on imagined fears of the consequences of extending to Amtrak the same freedoms that are enjoyed by its competitors—most notably, the airlines, which also receive substantial government assistance.[44] Amtrak could just as easily cite its concern that a decision subjecting its advertising policies to First Amendment scrutiny may result in a challenge to its policy against leasing ad space to its competitors. But the issue in this case neither requires nor warrants a weighing of such fears and concerns. The issue is a straightforward one: whether the government is truly "*responsible*" for Amtrak's policy against political advertising. *Blum*, 457 U.S. at 1005 (emphasis in original). The record shows that it is not.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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[44] *See* note 26, *supra*.

APPENDIX

After a hard week's work, you're ready for the right place with the right one. Why make the right moment the right's moment? Coors Light not only has the taste that won't slow you down. It's the Silver Bullet that aims the Far Right's political agenda at the heart of America. Want the awesome facts? Then read between these lines.

Every year, the Coors family, owners of Coors Brewing Co., gives financial support to groups like The National Forum Foundation, Morality in Media, The Heritage Foundation and The Free Congress Foundation. They form part of a network that includes authoritarian religious and political extremists. When you buy Coors products, you help them turn back civil rights, censure [sic] high school textbooks, weaken labor laws and environmental protections, promote homophobia, and meddle in foreign affairs. Did you know Joe Coors himself bought an aircraft for the Nicaraguan contras?

Where are the Nicaraguan contras today? El Loco says "Once, we were glad to have Joe Coors and his friends on our side. Together, we fought the hard and dirty fight that drove Nicaraguans to the voting booth to make The Right's Choice for a Better Nicaragua! Now the shooting war is over; after 30,000 dead, I can walk into my favorite Managua bar and say, 'No more of that industrial strength Nicaraguan cervesa for me. Gimme the great taste of Coors Light!' But my family, and Nicaraguan families everywhere, are poorer than ever. With 55% unemployed, we scour garbage heaps for food in the villages we ravaged. What happened to all that promised U.S. aid? What does it really mean to say that Coors Light is The Right's Beer now?"

E 2210-18 (footnotes omitted).

No. 93-1525 (10)

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NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

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INTRODUCTION

Amtrak asks this Court to hold that where the federal government creates an entity, mandates its purposes and structure, appoints its board, keeps it afloat through massive annual subsidies, purchases all of its property with tax dollars, and owns all of its voting stock, the entity should nonetheless be immune from constitutional constraints unless it takes action that is compelled or encouraged by a government official. In Amtrak's view of state action, a corporation created, controlled, and owned by the government need not abide by the Constitution so long as the government says it is

"not a government agency." This view would permit Congress to insulate whole areas of government responsibility from the Constitution through a mere label. Such an elevation of form over substance is contrary to the whole tenor of the state action doctrine and should be rejected.

The principal purpose of the state action doctrine is to hold government accountable where appropriate, regardless of the form in which it acts. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936 (1982). A corollary purpose is to "permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991). Both purposes are served by finding state action here: Amtrak is in all objective respects a government actor; and no appreciable private interest is served by affording such a government-controlled entity a right to discriminate against speech on content-based grounds.

ARGUMENT

I. AMTRAK SHOULD BE SUBJECT TO CONSTITUTIONAL CONSTRAINTS BECAUSE IT IS OWNED AND CONTROLLED BY THE UNITED STATES GOVERNMENT

In his opening brief, Lebron argued that because the United States owns and controls Amtrak, Amtrak's actions should be as subject to constitutional constraint as the Department of Transportation's actions are. Since the purpose of the state action doctrine is to apply constitutional limits where the government is responsible for certain conduct, it follows that where the government directly controls and owns an entity, it is constitutionally responsible for that entity's conduct.

Amtrak does not directly refute this principle, but instead makes four arguments for concluding that Amtrak should not be subject to the Constitution, notwithstanding the government's control and ownership. As a threshold matter, it contends that petitioner waived the argument by failing to argue below that Amtrak is a government entity. On the merits, it maintains that Amtrak should be insulated from constitutional constraints because: (1) it has a corporate structure and is to be "managed and operated as a for-profit corporation;" (2) Congress has stated that it is not a federal agency or instrumentality; and (3) this Court's prior opinions have determined that Amtrak is a nongovernmental entity. We will address these four contentions in turn.

A. Lebron Has Not Waived Any Arguments In Support Of His Claim That Amtrak Should Be Treated As A Government Actor

Amtrak contends that because Lebron did not argue in the lower courts that Amtrak is a government entity, he is foreclosed from arguing here that it should be treated as such for constitutional purposes. Resp. Br. at 13-15. That contention fails as a matter of law and fact.

As a legal matter, one waives only *claims*, not *arguments*. *Yee v. City of Escondido*, 112 S. Ct. 1522, 1532 (1992). As long as "a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."[1] *Id.* Amtrak cannot and does not maintain that Lebron has waived any legal *claim*. From the beginning, Lebron's federal

[1] In *Yee*, petitioners challenged an ordinance as a taking. In the Supreme Court, they made two separate arguments in support of that claim: that it was a physical taking, and that it was a regulatory taking. The city argued that petitioners had waived the regulatory taking argument because they had not made it in the lower courts. Brief for Respondent City of Escondido at 31-33. The Court held that it did not matter whether petitioners had made the regulatory *argument* below, since they had presented a takings *claim* and therefore could advance in the Supreme Court any *arguments* they chose in support of that *claim*. *Yee*, 112 S. Ct. at 1532. (The Court went on to hold, however, that the regulatory taking argument was not encompassed in the question presented.)

claims—which allege violations of the First and Fifth Amendments—have been predicated on the assertion that Amtrak should be treated as a government actor because it is owned and controlled by the United States. Thus, because Lebron has waived none of his claims that Amtrak has violated the First and Fifth Amendments, he "can make any argument in support of th[ose] claim[s]."[2]

As a factual matter, while Lebron did not rely on the precise terminology of "government entity," he did argue below that federal ownership and control made Amtrak a government actor, the same argument he advances as Point I of his opening brief.[3] Amtrak argued in response that it was a "private, for-profit corporation," C.A. Brief of National Railroad Passenger Corp. at 11, and the Second Circuit expressly addressed the argument, holding that Amtrak is not a gov-

[2] *Id.*; *see also Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899) (Court may consider any argument "so connected with [the legal claim] in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment . . . . Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed").

[3] In his appeal brief, Lebron argued that Amtrak should be treated as a government actor because the United States "created Amtrak, . . . dictated every aspect of Amtrak's corporate purpose and structure, granted it rights and privileges generally restricted to government agencies, [ ] subjected it to obligations ordinarily imposed only on government agencies . . . owns all of Amtrak's voting stock, and controls the entire membership of Amtrak's board." C.A. Brief for Michael A. Lebron 25-26.

Similarly, Lebron argued in his petition for certiorari that "[t]he court of appeals' decision treats Amtrak, *an entity that is public in every aspect but name*, as private for constitutional purposes." Pet. Br. at 10 (emphasis added); *id.* at 13 ("If the Second Circuit's decision stands, federal, state, and local governments could avoid constitutional limits on their actions merely by labeling as 'non-governmental' institutions that are in fact government-subsidized and government-controlled."); *id.* at 18 (arguing that government ownership of preferred shares and appointment of directors is "sufficient to render Amtrak a state actor").

ernment entity.[4] Finally, because all of petitioner's state action arguments rest on the same undisputed facts and because Amtrak has fully addressed all of the arguments, Amtrak is not prejudiced in any way.[5]

B. Amtrak Is Not An Independent Private Corporation, But Is Wholly Subject To Government Control

Amtrak contends throughout its brief that it cannot be a government actor as a general matter because it is a private, for-profit corporation, at one point even invoking the notion of the "corporate veil." Resp. Br. at 1-7, 16 n.15, 26-32. This argument is doubly flawed: the corporate veil is not designed to insulate governmental entities from constitutional constraints; and Amtrak is no ordinary corporation.

[4] The Second Circuit reasoned:

> Government action is most readily found when the conduct at issue is performed by a governmental entity. However, that is not the case here. The Rail Passenger Act of 1970 . . . created Amtrak as a private, for-profit corporation under the District of Columbia Business Corporations Act. This legislation rejected earlier suggestions that the nation's passenger railroad service be nationalized. Accordingly, the Act specified that Amtrak is 'not . . . an agency, instrumentality, authority, or entity, or establishment of the United States Government.'

Pet. App. 7a (citations omitted).

[5] Amtrak's suggestion that certiorari should be dismissed as improvidently granted, Resp. Br. at 15, is frivolous. The questions presented in petitioner's brief are identical to those in the petition. The petition asked whether Amtrak's advertising policy was state action given a set of undisputed facts. Pet. Br. at i. Those facts support all three of the state action theories Lebron advances, and the petition did not limit the question presented to any particular theory. Moreover, Lebron has in no way "withdrawn" the contention that Amtrak's federally-appointed Board expressly approved the policy at issue here. *See infra* Section III; Pet. Br. at 35 ("the Board itself approved the challenged policy").

First, the corporate veil has nothing to do with the state action doctrine. It is designed to insulate shareholders from monetary liability for the debts of corporations in order to encourage capital formation and investment, to diversify investors' risks, and to subsidize corporate entities by allocating risk to creditors of insolvent corporations.[6] No precedent suggests that the corporate veil is a shield against *constitutional* responsibility. Indeed, since incorporation itself is a matter of statutory law, to allow corporate structure to subvert constitutional obligations would undermine the supremacy of the Constitution.

Second, Amtrak's efforts to portray itself as an ordinary "private, for-profit corporation" only underscore the extent to which it is not.[7] The only reason Amtrak is operated "as a for-profit corporation" providing rail passenger service is because Congress has mandated that it do so. Private corporations independently *choose* whether to operate on a for-profit or a

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[6] *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990); *Anderson v. Abbott*, 321 U.S. 349, 361-62 (1944); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036, 1039-40 (1991).

[7] Both Amtrak and the United States have argued that Amtrak should be treated not as an ordinary private entity, but as a government entity, when it suits their purposes. Pet. Br. at 30 n.43; *see also National R.R. Passenger Corp. v. Commonwealth of Pennsylvania P.U.C.*, 848 F.2d 436, 440 (3d Cir.) (accepting Amtrak's argument that its exemption from state taxes should be broadly construed because Amtrak is not a private corporation, but a federal entity that should be exempt " '*to the same extent as the United States is exempt*,' " quoting H.R. Rep. No. 81, 97th Cong., 1st Sess. 21 (1981) (court's emphasis)), *cert. denied*, 488 U.S. 893 (1988); United States' Response to Defendant's Motion to Dismiss or Transfer 16-22 in *United States v. Kaplan Trucking Co.*, No. 94-962-C (S.D. Ind., filed Sept. 16, 1994) (arguing that Amtrak falls within the False Claims Act "[b]ecause Amtrak is a quasi-public Government corporation, and because of the Federal government's 'deep and controlling entwinement' in Amtrak's structure and operations"). (A copy of this brief, which details the United States' extensive control over and investment in Amtrak, has been lodged with the Court.)

not-for-profit basis, what kind of business to conduct, and whether to change the nature of their business. Amtrak, by contrast, must do what Congress has instructed it to do in the form and manner that Congress has (in detail) prescribed.[8]

While Congress initially gave Amtrak some of the trappings of a private corporation—it was established as a "for-profit" corporation and originally had only private shareholders—Congress always retained the power to override Amtrak's corporate structure. 45 U.S.C. § 541 (Amtrak incorporated under D.C. Business Corporation Act, but only "to the extent consistent with" the federal Amtrak statute).[9] Congress has repeatedly exercised that power.

Most significantly for purposes of this case, in 1981 Congress, acknowledging the reality that Amtrak had never made a profit and was dependent on massive federal support, unilaterally transformed Amtrak into a corporation owned and

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[8] Amtrak also argues that because it performs a "commercial" function, and is supposed to operate on a for-profit basis, it is not a governmental entity. Resp. Br. at 16-17, 25-26. But neither the performance of a commercial function nor the attempt to make a profit are incompatible with being a government entity. The United States Enrichment Corporation, for example, is a wholly-owned government corporation designated as "an agency and instrumentality of the United States," 42 U.S.C. § 2297b(c), yet it was created specifically "[t]o operate as a business enterprise on a profitable and efficient basis." *Id.* at §§ 2297a(1), 2297c-1. Similarly, the Tennessee Valley Authority has commercial functions and is designed in large part to be self-supporting, yet is indisputably subject to the Constitution. 16 U.S.C. § 831n-4(f). Other government corporations, such as the Federal Crop Insurance Corporation, perform the traditionally commercial functions of providing insurance and credit, just as private insurance companies and banks have long done. Pet Br. at 24 n.30.

[9] In Pub. L. No. 103-272 § 24301 *et seq.*, 108 Stat. 745, 903 (1994), Congress revised and recodified "without substantive change" in Title 49 (Transportation) certain laws related to transportation, including the provisions in Title 45 relating to Amtrak. H.R. Rep. No. 180, 103d Cong., 2d Sess. 1 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818. For clarity, however, this brief continues to cite the provisions of Title 45.

controlled by government, and eliminated all private representation from the Board.[10] As a result, Amtrak today bears no resemblance to a private corporation:

- its Board is wholly appointed by the United States;
- the United States owns all of its preferred shares, and as of October 1992 had 791,982,000 votes to the common shareholders' 9,385,694 votes;[11]
- Congress dictates the qualifications—including the nationality—of its Board members, and sets the compensation for its directors and officers, 45 U.S.C. §§ 543(a)(1) and (5), 543(d);
- Congress has exempted it from all state and local taxes, 45 U.S.C. § 546b, because "State and local taxes on a primarily Federal investment are inappropriate;"[12]
- like a government agency, it is subject to the Freedom of Information Act, the Government in the Sunshine Act, the Americans with Disabilities Act, the Inspector General Act of 1978, and the Davis-Bacon Act;[13]

[10] In doing so, Congress overrode the D.C. Code and Amtrak's articles of incorporation and bylaws to: (1) eliminate all directors elected by the common shareholders from Amtrak's Board; and (2) mandate issuance to the United States of preferred shares in an amount equalling Congress's appropriations to Amtrak. Pet. Br. at 6-7; D.C. Code Ann. §§ 29-354, 29-355 (1981). As a practical matter, these measures eliminated the voting rights of the private shareholders and gave controlling power to the United States. The common shareholders were given no say in this process.

[11] J.A. 390-91. The common shares are nonvoting in the sense that they do not elect directors. While it is theoretically true, as Amtrak contends, that the common shareholders are entitled to vote on such major issues as merger, consolidation, and dissolution of the corporation, D.C. Code Ann. §§ 29-366 (1981), 29-378 (1981 & Supp. 1994), their votes would be meaningless. As the sole owner of the preferred shares, the Secretary of Transportation's vote would always be determinative.

[12] S. Rep. No. 253, 97th Cong., 1st Sess. 103 (1981).

[13] *See* Pet. Br. at 8-9; 45 U.S.C. § 565(d). The Davis-Bacon Act, 40 U.S.C. § 276a, sets wage levels for certain types of construction contracts to which the United States or the District of Columbia is party. The Act treats Amtrak not as a contractor, but as the United States.

- it is audited by the General Accounting Office, and must report to Congress annually on its fiscal condition, on-time performance, passenger services, and related matters, Pet. Br. at 9 & n.17;
- Congress does not require it to be profitable, but only to recover 61% of its costs (excluding capital costs) from revenues, 45 U.S.C. § 564(c)(4)(A);
- and, unlike any other private for-profit corporation we know of, it has existed for 24 years without once making a profit, depending instead for its survival on billions of dollars of federal support, 45 U.S.C. §§ 601, 854.[14]

Although Amtrak denies that it is covered by the Government in the Sunshine Act, Congress made clear that it intended the Act to cover Amtrak. H.R. Conf. Rep. No. 1441, 94th Cong., 2d Sess. 10-11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2244, 2246 ("the intent and understanding of the conferees is that meetings of . . . [Amtrak] are included within the definition of agency"). And Amtrak acts as if it is covered. J.A. 652 (Appendix A to Amtrak's Bylaws "implements the spirit and intent of the Government in the Sunshine Act").

[14] In an attempt to camouflage its overwhelming federal subsidies, Amtrak points to the initial $197 million contribution from private railroad companies. Resp. Br. at 3. Amtrak provides no authority for this figure, and it more than doubles the stated paid-in capital represented by the common shares in every Amtrak annual report. *See, e.g.*, J.A. 387 (1992), 418 (1976). But even if Amtrak's figure is correct, it amounts to only 1.3 percent of the approximately $15 billion that Congress has appropriated for Amtrak. 45 U.S.C. §§ 601(a) and (b); 854(a)(1) and (a)(2) (1988 & Supp. II 1990, Supp. IV 1992).

Amtrak is similarly disingenuous in suggesting that it independently paid $87 million for the Northeast Corridor properties transferred to it by congressional mandate. Resp. Br. at 4. In fact, Amtrak agreed to pay that amount over an eight-year period from 1976-84, during which time Amtrak made not one cent in profits and received $5.5 billion in federal appropriations. G. Hilton, *Amtrak: The National Railroad Passenger Corporation* 27 (1980); 45 U.S.C. §§ 601(a) and (b) (1988).

(*footnote continued*)

Thus, Amtrak is for all intents and purposes a government corporation controlled and owned by the United States.[15] The only thing even nominally private about Amtrak is its four private shareholders, but Congress has ensured that their shares are chimerical: they provide no representation on the Board, no effective voting control, and are worthless. Pet Br. at 8.[16]

Amtrak also attempts to minimize its financial dependence on the United States by claiming that in 1992 the federal subsidy was "only" 18 percent of its total operating expenses and that that percentage has been declining. Resp. Br. at 5, 20 n.21. As recent GAO testimony demonstrates, however, this figure is misleading: it does not consider capital expenses at all, and excludes expenses such as depreciation, taxes, user fees, retirement payments, and certain losses. *Department of Transportation and Related Agencies Appropriations for 1995, Hearings Before the Transportation Subcomm. of the House Appropriations Comm.*, 103d Cong., 2d Sess. 587, 599 (Mar. 17, 1994) (Testimony of Kenneth Mead). For 1993 alone, the GAO calculated that Amtrak omitted $370 million in actual operating expenses from its revenue-to-expense ratio. *Id.* at 587. Furthermore, since 1987, Amtrak has spent down its working capital by $252 million, and as a result, its "current financial condition has deteriorated in recent years." *Id.* at 593. Amtrak has in fact received steadily *increasing* annual appropriations from Congress, exceeding $900 million in 1994, *id.* at 596, and "its total needs for federal subsidies (operating and capital) have steadily increased," *id.* at 593. Amtrak requested almost $1.3 billion in federal support for fiscal year 1995. In short, this is not a corporation moving toward financial independence.

[15] These factors obviously distinguish Amtrak from "American Airlines, Chrysler, and the American farmer," Resp. Br. at 27, because none of those entities is owned and controlled by the United States.

[16] Even if Amtrak retains some vestigial corporate form, courts have long recognized that "a corporate entity may be disregarded in the interests of public convenience, fairness and equity." *Capital Telephone Co. v. FCC*, 498 F.2d 734, 738 & n.10 (D.C. Cir. 1974) ("Where the statutory purpose could be easily frustrated through the use of separate corporate entities a regulatory commission is entitled to look through [them]"); *Chicago, Milwaukee & St. Paul Ry. v. Minneapolis Civic and Commerce Ass'n*, 247 U.S. 490, 500-01 (1918); *Francis O. Day Co. v. Shapiro*, 267 F.2d 669, 672-74 (D.C. Cir. 1959). If public statutory policy warrants ignoring the corporate form, the Constitution surely does too.

C. Congress's Label Does Not Govern The State Action Inquiry

Notwithstanding the above facts, Amtrak contends that the Court should find that Amtrak is not a governmental actor for constitutional purposes because Congress designated Amtrak "not an agency . . . of the United States Government." Resp. Br. at 16-18, 22-23. Yet it admits, as it must, that Congress's label cannot "ultimately determine whether the Constitution applies to a particular action Amtrak takes." *Id.* at 23 n.23. As one district court more directly stated, "[i]f federal government involvement with Amtrak resulted in constitutional deprivations, a congressional attempt to disavow the involvement could hardly insulate it from the Constitution." *Marcucci v. National R.R. Passenger Corp.*, 589 F. Supp. 725, 727 n.3 (N.D. Ill. 1984).

The question here is not whether Congress's label is "a mistake or sham." Resp. Br. at 23. Indeed, there is no evidence that Congress's label was even intended to address the state action inquiry. For that matter, Congress has not been consistent with its labels, and has frequently treated Amtrak as a government entity (*see* Pet. Br. at 8-9), subjecting it to obligations only government entities bear.[17]

Labels aside, the question for the Court is simply whether the objective relationship between the government and Amtrak is such that Amtrak's conduct should be subject to the Constitution.

[17] Amtrak has no effective response to this fact, so it buries it in a footnote. Resp. Br. at 17 n.17. Buried with it is Amtrak's flat assertion that "it does not help petitioner that Amtrak is included in a list of 'mixed-ownership Government corporations,' " without an explanation why, if it does not help petitioner when Congress treats Amtrak as a government entity, it should help Amtrak when Congress says that Amtrak is not an agency of the United States.

D. This Court Has Not Addressed Whether Amtrak, In Its Current Form, Is A Government Entity

Amtrak argues that this Court has already held that Amtrak is not a government entity in *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451 (1985), and has also held that the "similarly structured" (in Amtrak's words) Conrail is not a federal instrumentality in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 152 (1974). Resp. Br. at 18-20, 29-30. Neither case is controlling here.

As Lebron previously pointed out, Pet. Br. at 28 n.39, while the Court in *Atchison, Topeka* stated that Amtrak was a nongovernmental entity, that statement was unnecessary to the result. Whether the contracts at issue were with a government entity or a private entity would not have changed the result, because the Court squarely held that the contracts did not create the right assertedly impaired.[18] 470 U.S. at 474-75.

More important, Amtrak today is a very different entity from the 1971 Amtrak that signed the Basic Agreements at issue in *Atchison, Topeka*.[19] At that time, Amtrak was wholly

[18] Amtrak suggests that because the Court might have applied a more rigorous standard of review to a claim that Congress had impaired its own contractual obligations, the Court's treatment of Amtrak as a nongovernmental entity might have made a difference to the result. Resp. Br. at 19 n.19. But the more rigorous review to which Amtrak refers implies only that Congress has less scope to *impair* its own obligations than to impair private contractual arrangements. *Perry v. United States*, 294 U.S. 330, 350-51 (1935). It does *not* affect the prior issue of whether the contract creates the right asserted, the issue the railroads lost in *Atchison, Topeka*. Nothing in that case—or indeed any other—suggests that the same contractual language would give rise to a contract right when signed by a governmental entity but not when signed by a nongovernmental entity.

[19] Amtrak suggests that "Amtrak's structure and operations at the time [*Atchison, Topeka* was] decided were essentially the same as they are today," Resp. Br. at 20 n.21, but the relevant time period was obviously not 1985, when the case was decided, but 1971, when the Basic Agreements were signed. The issue was whether Amtrak was a governmental or nongovernmental entity when the Basic Agreements were signed and the original legislation went into effect, *i.e.*, in 1971. Amtrak's structure as of 1985 was therefore not relevant to the issues decided.

owned by private shareholders. Today, by contrast, the United States has effectively taken it over, and for all practical purposes is its sole owner. Thus, even if it were accurate to say that Amtrak was a nongovernmental entity as of 1971, it is inaccurate today.

For the same reasons, Amtrak's reliance on the Court's treatment of Conrail in 1974 is misplaced. In the *Regional Rail Reorganization Act Cases*, the Court found that Conrail was not a "federal instrumentality" for eminent domain purposes. 419 U.S. at 152. But Conrail did not even exist at that time; it did not come into being until two years later, in 1976.[20] Thus, the Court could examine only Congress's intention for Conrail as reflected in the reorganization statute, and the stated intention was that Conrail, while initially supported by some government funds, would become a private corporation. 419 U.S. at 152. The Court reasoned that while Conrail would have federally-appointed directors on its Board, those directors' responsibilities "are not different from those of the other directors—to operate Conrail at a profit for the benefit of its shareholders." *Id.* Thus, in 1974 the Court treated the future Conrail as a private entity because that was Congress's plan; in fact, Conrail was eventually privatized. While Congress initially had similar hopes for Amtrak, those hopes were soon dashed, and Congress made Amtrak a government corporation.

II. THE SYMBIOTIC RELATIONSHIP TEST IS NOT LIMITED TO EQUAL PROTECTION CLAIMS

Lebron's opening brief demonstrated that Amtrak's relationships with the federal government and several state enti-

[20] Lloyd Musolf, *Uncle Sam's Private, Profitseeking Corporations: Comsat, Fannie Mae, Amtrak, and Conrail* 76 (1983).

ties at Penn Station easily satisfy the "symbiotic relationship" test for state action first articulated in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). Pet. Br. at 32-37. Amtrak does not dispute that such a symbiotic relationship exists here, and it makes no attempt to distinguish its governmental relationship from that of the Eagle Coffee Shoppe and the State of Delaware in *Burton*.

Instead, Amtrak argues that the *Burton* test should be limited to equal protection claims. Resp. Br. at 41-49. Under this extraordinary view, the same action by the same entity with the same ties to government will be state action for purposes of some constitutional challenges but not others. Thus, had the Eagle Coffee Shoppe refused to serve customers who would not declare their support for the Ku Klux Klan, its conduct would be state action for a race discrimination challenge, but private conduct for a First Amendment challenge.

This argument is simply another version of the Second Circuit's differential state action analysis, yet Amtrak offers no response to the anomalies that such an approach creates. Pet. Br. at 42-45.[21] Amtrak contends that this double standard is compelled by the Equal Protection Clause, which, it maintains, is unique in that it may be violated by government inaction. As shown below, Amtrak's theory is premised on a false distinction, cannot be squared with this Court's own treatment of *Burton*, and misunderstands both the equal protection and state action doctrines.

Amtrak's argument collapses at the outset because it is based on a false distinction. As this Court has long recognized, discriminatory conduct that violates the First Amendment also violates the Equal Protection Clause. *Carey v. Brown*, 447 U.S. 455, 474 (1980); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Amtrak's refusal

[21] For example, Amtrak does not explain why under its theory discrimination based on race, gender, or religion triggers a *Burton* analysis, Resp. Br. at 49-50, but discrimination based on speech does not.

to display Lebron's advertisement is a failure to treat Lebron equally because of the political content of his speech, and as such Lebron has claimed that it violates *both* his free speech and equal protection rights.[22] Since First Amendment claims can virtually always be cast as equal protection claims, Amtrak's proffered distinction is illusory.

Amtrak's view of *Burton* is also contrary to this Court's application of *Burton* over more than thirty years. As Lebron pointed out in his opening brief, both this Court and lower courts have routinely applied *Burton*'s "symbiotic relationship" analysis to claims other than race discrimination, including First Amendment and due process claims. Pet. Br. at 42 & nn.57, 58.

Amtrak's rationale for limiting *Burton* to equal protection claims rests on a misunderstanding of both the equal protection *and* state action doctrines. Contrary to Amtrak's brief, the Equal Protection Clause is generally *not* violated by government inaction. In fact, only government action that is intentionally designed to harm an identifiable group violates the Fourteenth Amendment.[23]

While the *Burton* Court did state that in certain circumstances, government "inaction" in the face of discrimination may violate the Constitution, 365 U.S. at 725, that is a func-

[22] Lebron pleaded both equal protection and First Amendment claims in his complaint. C.A. App. A91 (First Amendment claim); *id.* at A92 (equal protection claim), and briefed both claims in the district court. *See* Plaintiff's Conclusions of Law at 28-30, Plaintiff's Mem. in Supp. of Motion for TRO and Preliminary Injunction at 28-30. The district court reached only the First Amendment claim.

[23] *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (equal protection violation requires showing that government official "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group") (quoting *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979)); *Washington v. Davis*, 426 U.S. 229 (1976) (police department's failure to change test that disproportionately disqualified black applicants does not violate equal protection).

tion of the state action doctrine, not the Fourteenth Amendment. No matter what constitutional provision is at issue, government inaction may violate the Constitution where the government has such a symbiotic relationship with another entity that it is "a joint participant in the challenged activity." *Id.* But in that circumstance, the government is not being held liable for *inaction*; rather, the government *and* the other entity are held jointly responsible for the entity's *action*.

Thus, Amtrak is wrong when it suggests—without any authority—that the Eagle Coffee Shoppe would not have been engaged in state action had it discriminated on the basis of speech rather than race. If, to take Amtrak's hypothetical, the Eagle Coffee Shoppe had refused to display a political ad for the same reason that it refused to serve black patrons—on the ground that it might drive away other customers and thereby reduce revenues—all the factors that supported the symbiotic relationship would have been the same, and state action would have been properly found.

Amtrak argues that First Amendment claims should be treated differently because while a private entity has no right to discriminate, it does have First Amendment rights. But the notion that Amtrak—controlled and owned by the federal government—should have a First Amendment right to engage in content discrimination gets the Constitution precisely backwards. When an entity is a "joint participant" with the government such that its actions are state action, it is no longer private for those purposes, and thus it has no more First Amendment rights than the government with which it is a joint participant.

Amtrak's claim that it should be protected by the First Amendment leads precisely to the dangers that Judge Pierre N. Leval initially identified. Pet. App. at 12b. Under Amtrak's view, not only can it not be sued under the First Amendment for engaging in content discrimination, it can use the First Amendment as a shield against the federal government's

attempts to control its speech access policies, no matter how discriminatory its policies may be. *See* Pet. Br. at 28-30.

III. THE UNITED STATES' CONTROL OF AMTRAK SATISFIES THE CLOSE NEXUS TEST, BECAUSE THE FEDERALLY-APPOINTED BOARD IS DIRECTLY RESPONSIBLE FOR THE POLICY CHALLENGED HERE

Amtrak argues that the "close nexus" test is the *only* state action test that the Court should apply here, and that Lebron has failed to satisfy that test. Both claims are wrong.

First, Amtrak's contention that the "close nexus" test is *the* appropriate test here, Resp. Br. at 36, would require rejection of much of this Court's state action jurisprudence, and would leave the Court without adequate tools to determine when "the nonobvious involvement of the State in private conduct" supports the application of constitutional constraints. *Burton*, 365 U.S. at 722. The "close nexus" test is just one of several tests the Court has formulated for determining when to apply constitutional constraints to an entity that is not indisputably governmental, but it is certainly not the only one. If state action could not be established without showing that government encouraged or compelled the conduct in question, this Court's most recent state action decisions would have been wrongly decided. In neither *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), nor *Georgia v. McCollum*, 112 S. Ct. 2348 (1992), was there any evidence that the state compelled or encouraged the attorneys to engage in race-based peremptory challenges.[24]

---

[24] Indeed, in all of the cases Amtrak cites to support its "close nexus" argument, the Court also applied the "symbiotic relationship" test that Amtrak now argues should be restricted to equal protection claims. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 841-42 (1982); *Blum v. Yaretsky*, 457 U.S. 991, 1010-11 (1982); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 547 n.29 (1987).

Second, the Board's direct responsibility for Amtrak's advertising policy satisfies the "close nexus" test. Amtrak contends that the Board "is not the United States," because the directors are not federal officials, and their responsibilities "are no different from those of the directors of any other corporation—'to operate [Amtrak] at a profit for the benefit of the shareholders.' " Resp. Br. at 37.

But whether someone appointed by and acting on behalf of the United States is labeled an "official" can hardly decide the state action question—such an approach would be subject to the same tautological problems as would relying on Congress's statement that Amtrak is not a government agency. And while the directors are responsible to the "shareholders," the shareholders are, for all practical purposes, the United States government. Thus, these directors are not like any other corporate directors—they are appointed by and responsible to the government. Together, they constitute the policy-making body for an entity owned and controlled by government. As such, their actions are government action.

Amtrak also maintains that even if the Board's actions can be attributed to the federal government, the Board had no responsibility for the policy challenged here. This is a remarkable argument, given that Amtrak itself refers to the ban on political advertising as its "long-standing policy." Resp. Br. at 2, 49. Amtrak objects that there is no evidence in the record showing that the directors actually sat down and read the specific pages of the contracts that authorize the policy. *Id.* at 38-40. But of course, that will often be the case with boards of directors, and indeed, high (and not-so-high) government officials. Nonetheless, it is black-letter law that a board is responsible for corporate policy and cannot evade that responsibility by claiming ignorance.[25]

[25] American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* § 3.03 (May 13, 1992) (knowledge of corporate documents is imputed to directors); *Estate of Grant v. U.S. News & World Report, Inc.*, 639 F. Supp. 342, 349 (D.D.C. 1986) (directors cannot plead ignorance of corporate documents unless they were "actively concealed").

Moreover, the evidence unequivocally supports the conclusion that Amtrak's Board expressly approved this policy. According to Amtrak, the only written authority for the policy is contained in a series of contracts between TDI and Amtrak, dating between 1980 and 1991, each of which—again according to Amtrak—could not have been signed without Board approval. J.A. 28; Pet. Br. at 35 n.50. And the record shows that the Board expressly authorized the most recent contract, re-endorsing the language that Amtrak may reject any advertising it finds "objectionable." J.A. 401-02, 204.

In the face of this evidence, Amtrak argues that because the Board authorized the 1991 contract *before* it was signed, the Board members did not necessarily read the contract, and should not be deemed responsible for its terms. Resp. Br. at 38-39. But as a practical matter, boards often authorize contracts before they are signed, particularly where, as here, the contract cannot be signed without board approval. Amtrak's argument would make nobody responsible for the contract: the officer who physically signed it could point to the Board, which formally authorized him to do it, and the Board could point back at the officer, because he signed it after the Board approved it. Amtrak's argument is particularly disingenuous in light of its representation that the policy against political advertising, reauthorized by the 1991 contract language, has been in existence since Amtrak's inception.

Therefore, even under the "close nexus" test, state action is established here because the "long-standing" policy challenged was approved by and is the direct responsibility of Amtrak's Board of federal appointees.

CONCLUSION

For the foregoing reasons and those stated in petitioner's opening brief, the decision of the court of appeals should be reversed, and the case remanded for determination of Lebron's First and Fifth Amendment claims.

Respectfully submitted,

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL A. LEBRON,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with nearly 300,000 members. The New York Civil Liberties Union (NYCLU) is one of its statewide affiliates. Since its founding over 70 years ago, the ACLU has consistently promoted individual rights and liberties, including the right to freedom of expression. It has litigated or participated as *amicus* in hundreds of cases brought to vindicate First Amendment rights. In 1991 the ACLU established an Arts Censorship Project specifically to combat an increased climate of censorship in the United States.

Accordingly, the issues presented by this case involve matters of direct concern to the ACLU. We therefore submit this brief *amicus curiae* to assist the Court in its deliberations.

STATEMENT OF THE CASE

This case concerns an artist who was refused access to advertising space in New York's Pennsylvania Station based on the "political" content of his work. Michael A. Lebron contacted Amtrak in 1991 about displaying an advertisement in a large billboard space in Penn Station known as the Spectacular. The work he sought to display was a photomontage with text. The work was described by the district court as "[t]aking off on a widely circulated Coors beer advertisement," and "criticizing the Coors family for its support of right-wing causes . . . ." *Lebron v. National R.R. Passenger Corp. (Amtrak)*, 811 F. Supp. 993, 995 (S.D.N.Y. 1993).

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

During the negotiation of the contract to rent the space, Lebron notified Amtrak's advertising rental agency that the work he intended to install was political. He was not told that this would be a problem. In November 1992, Lebron and Amtrak signed a contract for the space. Three days before the advertisement was to appear, however, Lebron learned that Amtrak had changed its mind. He was informed that Amtrak had a policy prohibiting display of "political" advertising.

Lebron sued, alleging violation of his First Amendment rights. The district court ruled for Lebron. 811 F.Supp. 993. The court first held that Amtrak was a state actor "based on examination of the federal government's deep and controlling entwinement in Amtrak's structure and operations." *Id.* at 997. The court made findings about the many specific ways in which the federal government was involved in the activities of Amtrak. *Id.* at 997-1000. The court went on to find that Amtrak's rejection of Lebron's work violated the First Amendment. *Id.* at 1001-05.

On appeal, a divided panel of the Second Circuit reversed. *See Lebron v. National R.R. Passenger Corp. (Amtrak)*, 12 F.3d 388 (2d Cir. 1993). The majority held that Amtrak was not a state actor, relying in part upon its view that a party should be required to meet a higher burden to show state action in First Amendment cases than in some other constitutional cases. Judge Newman dissented on the ground that the district court's findings of extensive government involvement "in the structure and financing of Amtrak" sufficiently demonstrated state action.

SUMMARY OF ARGUMENT

The court below erred when it dismissed Lebron's claim on the ground that Amtrak was not a state actor and therefore was not bound by the First Amendment.

Amtrak has significant and pervasive connections to the government. Under the "mutual contacts" test for state action that this Court has applied since *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), and has continued to apply in more recent years, *see, e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), respondent should be held to be a state actor and its actions should be required to conform to the First Amendment.

This Court has long recognized that in certain circumstances where the government and a private actor are pervasively intertwined, state action should be found regardless of whether a specific action has been funded, encouraged, or coerced by government. This Court has looked to three factors in making this determination: (1) whether the government is significantly and pervasively involved in the private entity's affairs; (2) whether the government controls the activities of the private entity; and (3) whether the ties between the government and the private entity create the appearance of state involvement in unconstitutional conduct. Under these guidelines, Amtrak, with its broad and pervasive ties to the federal government, is a state actor subject to constitutional standards.

The court below also erred in holding that different tests of state action should be used to determine whether an ostensibly private entity should be held to constitutional standards depending on the constitutional right involved. The state action analysis should not vary depending on the constitutional right involved. Moreover, in no case should a test be applied that accords the First Amendment anything less than the highest level of protection.

ARGUMENT

I. AMTRAK'S SIGNIFICANT ENTANGLEMENTS WITH GOVERNMENT MAKE IT A STATE ACTOR WHOSE DECISIONS ARE SUBJECT TO THE FIRST AMENDMENT

This Court has long held that state action may be found when private parties' actions are significantly entangled with the government. There is no easy formula for making these determinations: it may be difficult at times to decide precisely how much entanglement is enough. But the absence of a neat formula does not detract from the clear importance of the principles underlying this notion that significant and pervasive connections to the government can create state action. In cases such as this one, where a putatively private party has extensive entanglements with the government that create both the appearance and the reality of government involvement, this Court should have no hesitation in reaffirming the principle that when government has "so far insinuated itself into a position of interdependence" with a private entity, "it must be recognized as a joint participant in the challenged activity." *Burton v. Wilmington Parking Authority*, 365 U.S. at 725.

For more than three decades, this Court has held that when the connections between a private party and the government are sufficiently great, the actions of the private party constitute state action. *See, e.g., Tulsa Professional Collection Servs. v. Pope*, 485 U.S. 478, 486 (1988)("[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found"); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (state action held to exist based on involvement of state officials in prejudgment attachment process in which debtor's property was taken); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (state action where private restaurant has "symbiotic relationship" with

governmental entity).

This particular strand of the state action doctrine goes by different names, including the "mutual contacts" test, the "symbiotic relationship" test, the "multiple contacts" test, and the "nexus" test. *See, e.g., Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972)(discussing the "symbiotic relationship" test); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)(discussing "nexus" between actor and state); R. Rotunda & J. Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 558 (2d ed. 1992)(discussing "mutual contacts" and "multiple contacts" test). But however it is expressed, the idea is the same: that in some cases "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans v. Newton*, 382 U.S. 296, 299 (1966).

There has been a fair amount of uncertainty expressed recently over the condition of state action jurisprudence generally and over the "mutual contacts" test specifically. *See, e.g., Edmonson v. Leesville Concrete Co*, 500 U.S. 614, 631 (1991)(O'Connor, J., dissenting); L. Tribe, AMERICAN CONSTITUTIONAL LAW 1690 (2d ed. 1988)("the Supreme Court has not succeeded in developing a body of state action 'doctrine,' a set of rules for determining whether governmental or private actors are to be deemed responsible for an asserted constitutional violation"). Indeed, few would argue that state action doctrine today is not in need of some clarification and reevaluation. The question is how to clarify and reevaluate the doctrine without doing damage to the worthy principles underlying it.

With increasing frequency, the state action inquiry has focused on whether the government has coerced or provided significant encouragement to the particular activity that is being challenged on constitutional grounds.

See, e.g., Blum v. Yaretsky, 457 U.S. 991, 1005 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982). That inquiry is a fair and reasonable one. A finding of state action is undoubtedly appropriate where a direct nexus exists between the government and the allegedly unconstitutional conduct of a "private" party. *See Blum*, 457 U.S. at 1005. It does not follow, however, that proof of such a direct nexus is the only way that state action can be established. For example, the government cannot evade its constitutional obligations by delegating traditional public functions to "private" actors. *See West v. Atkins*, 487 U.S. 42 (1988).

In addition, this Court has long recognized, and appropriately so, that in certain circumstances where the government and a private actor are pervasively intertwined, state action should be found regardless of whether a specific action has been funded, encouraged or coerced by government. Underlying this notion is the simple fact that in some situations two distinct entities become so interconnected that in appearance and reality they are essentially one. When this line is crossed, it is a mistake to treat these entities as if they were in fact separate actors. To do so elevates form over function, and misstates the proper status of the parties before the law.

When one of these parties is a government entity and the other is a private actor, the harm done by ignoring their interconnection is very specific. It allows citizens' constitutional rights -- to free speech, to free exercise of religion, to equal treatment under the law -- to be violated in a manner that is little different than if the government did so directly. If the Constitution prohibits the state from infringing on these rights directly, it should also be held to prohibit the state from taking these rights away through close collusion with a private party. In addition, insulating decisions by putatively private actors with extensive government entanglements

from constitutional review is harmful because it creates the appearance of government involvement in the deprivation of its citizens' constitutional rights.

One of the sources of dissatisfaction with the "mutual contacts" test is that it is said to be lacking in precision. *See, e.g.*, Rotunda & Nowak, TREATISE ON CONSTITUTIONAL LAW at 559. It is true that decisions in this area do not lend themselves to an "infallible test," *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967), and that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed to its true significance." *Burton*, 365 U.S. at 722. But this absence of a formulaic standard does not mean that the test is lacking in underlying principles, or that this Court should abandon the doctrine. *Cf. Waters v. Churchill*, __ U.S. __, 114 S.Ct. 1878, 1885 (1994)(absence of precise test for when procedural safeguard is required by First Amendment "does not relieve [the Court] of [its] responsibility to decide" the issue) (O'Connor, J.)(plurality opinion).

In fact, there are three overarching and somewhat overlapping principles that have long guided this Court's "mutual contacts" decisions and that should continue to do so: (1) that state action should be found where the government is significantly and pervasively involved with the affairs of a putatively private party whose actions are challenged; (2) that state action should be found where the putatively private actor is in fact effectively under the control of the government; and (3) that state action should be found in cases where the ties between the putatively private actor and the government are such that the appearance is created for the public at large that the government is involved in unconstitutional activity. Each of these underlying principles is important, and each compels a finding in this case that Amtrak is a state actor.

First, this Court's jurisprudence has long recognized

that state action may arise because of the government's significant and pervasive involvement[2] in the affairs of a "private" enterprise. It is a principle that dates back to this Court's early race discrimination cases, and that has never depended on a showing that the government is directly linked to the specifically challenged action. *See, e.g., Burton*, 365 U.S. 715; *Evans v. Newton*, 382 U.S. 296. It is also a principle that has been reaffirmed by this Court in numerous recent cases. *See, e.g., Edmonson v. Leesville Concrete Co.*, 500 U.S. 614; *Tulsa Professional Collection Services*, 485 U.S. at 486; *Lugar v. Edmondson Oil Co.*, 457 U.S. 922.

The rationale underlying this principle was cogently set forth in *Burton*:

> [A]ll these activities, obligations and responsibilities of the [state], the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicate[] that degree of state involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn.

Burton, 365 U.S. at 725; *see also Evans*, 382 U.S. at 301 (court finds state action in putatively private park in part because municipality "swept, manicured, watered, patrolled, and maintained" it).

In a number of recent cases, this Court has reiterated that state action will be found where a private party

[2] This "involvement" must take the form of more than just financial assistance. *See Rendell-Baker*, 457 U.S. at 841. When a private entity merely takes government funding, much like a private contractor, it is not a state actor. *See id.* But in cases like this one, where the assistance goes well beyond mere financial payments, this test is met.

is supported by "the overt, significant assistance of state officials." *Tulsa Professional Collection Services*, 485 U.S. at 486. In *Tulsa Professional Collection Services*, the Court found that the involvement of a state probate court in the enforcement of a state nonclaim statute was enough to constitute state action. *See id.* at 486-87. In *Edmonson*, Justice Kennedy wrote for a majority of the Court that the "overt, significant participation of the government" in the establishment and maintenance of the jury system helped to render the peremptory challenges of a private civil litigant state action. *Edmonson*, 500 U.S. at 622; *see also id.* at 628 ("when private litigants participate in the selection of jurors, they . . . act with [government's] substantial assistance"). Similarly, this Court stated in *Lugar* that a party may be held to be a state actor where he has "acted together with or has obtained significant aid from state officials." *Lugar*, 457 U.S. at 937. In *Lugar*, the Court held that a private actor who engaged in a prejudgment attachment of disputed property with the assistance of state actors had sufficient assistance from state officials in the attachment to render the activity state action. *See id.* at 941-42.

It should not be necessary that this significant and pervasive assistance go to the precise activity that is being challenged. When the entanglements between government and a private party are sufficiently great, that party should be considered a state actor for constitutional purposes. In *Evans*, for example, it was not necessary that the state directly assist the municipal park in excluding black citizens: it was enough that the state was closely intertwined with the park, and that the park's policies violated equal protection principles.

The extent to which the government benefits from its relationship to the private actor is also a relevant consideration. When the government stands to gain from the success of the private actor -- and particularly from its unconstitutional activities -- there is additional

basis for finding state action. *See Burton*, 365 U.S. at 724 (discriminatory policy of restaurant allegedly increased revenues and worked to the financial advantage of its landlord, the government).

Of course, this Court has held that the mere fact that a private entity receives government grants or contracts large amounts of business with the government does not render it a state actor. *See Rendell-Baker v. Kohn*, 457 U.S. at 841 (no state action where the private entity "is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government"); *see also Blum v. Yaretsky*, 457 U.S. 991 (no state action where decision to discharge patient was made by private physician despite the fact that it was influenced by medicaid standards).

But neither *Rendell-Baker* nor *Blum* is inconsistent with the fundamental notion, frequently affirmed by this Court, that at some point a line is crossed where the government is so involved with the affairs of a putatively private actor that the latter's actions can no longer be regarded as purely private. Minor levels of government involvement with a private party should not and do not transform that party into a state actor; indeed, funding alone is never enough to transform a private entity into a state actor. *Rendell-Baker*, 457 U.S. at 846. But when the involvement is sufficiently great and pervasive a point is reached where the government "must be recognized as a joint participant" in the private party's unconstitutional actions. *Burton*, 365 U.S. at 725. This was the simple point of *Lugar* -- that at a certain point a private actor, pursuing its private ends, involves the state to such a degree that it must be seen as having passed over the line from private actor to state actor. *See Lugar*, 457 U.S. 922.

Second, this Court's cases have long held that state action may arise where a putatively private actor is in

fact effectively under government control. In *Burton*, the Court based its finding of state action in part on the control that the state exercised over the racially discriminatory restaurant. The Court noted the state's ability to influence the restaurant's actions through its lease and held that it therefore "could have affirmatively required [the restaurant] to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation." *Burton*, 365 U.S. at 725; *see also Evans*, 382 U.S. at 301 ("If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment . . . .").

The workings of this government control principle can be seen in this Court's holding in *Little v. Streater*, 452 U.S. 1 (1981). In *Little*, an indigent man being sued for paternity alleged that a statute requiring him to pay the cost of a blood test violated his right to due process. Although the paternity suit was brought by a private individual, the Court noted that "unlike a common dispute between private parties, the State's involvement in this paternity proceeding was considerable and manifest, giving rise to a constitutional duty." *Id.* at 9. The Court emphasized the many ways that the suit, although nominally brought by a private individual, was in fact controlled by the state: a state statute required her to bring the action because the child received public assistance; the State's Attorney General automatically became a party and was required by statute to approve any settlement of the suit; the state paid the fees of the plaintiff's lawyer; and the state would receive any monthly support payments awarded by the court. *See id.* The Court concluded after reciting these indicia of control that "'[s]tate action' has undeniably pervaded this case." *Id.*

Conversely, in a number of cases where state action was not found, this Court has gone out of its way to emphasize that the private actor was not under the control

of the state. In *San Francisco Arts & Athletics Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), for example, this Court reiterated that state action could arise from state control over a private actor. However, the Court held that the U.S. Olympic Committee was not a state actor when it denied another group the right to use the word "Olympics." In reaching this holding, the Court emphasized that the group had "failed to demonstrate that the Federal Government can or does exert any influence over the exercise of the USOC's enforcement decisions." *Id.* at 547 n.29.

This "government control" principle allows courts to hold actors in undertakings that are significantly under the control of the government to the standards that would apply to the government if it were acting alone. This principle does not bring the standards of the Constitution into truly private areas where they do not belong. Rather, it is a crucial rule for ensuring that the government does not circumvent constitutional limitations by doing its unconstitutional deeds through a putatively private party that it in fact controls.[3]

Finally, this Court's state action cases have long recognized that state action may be found where the ties between a putatively private party and the government create an appearance of government authorization of the challenged activity. This concern about the appearance of government involvement in constitutional violations is a strand that runs through a number of this Court's state action cases. In *Burton*, the Court emphasized the ways in which the government appeared to the public to be connected to the restaurant that discriminated on the basis of race. It noted "the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service," 365 U.S. at 724, and the fact that "the Authority located at appropriate places [on the facility] official signs indicating the public character of the building, and flew from mastheads on the roof both the state and national flags." *Id.* at 720.

Similarly, in *Evans v. Newton*, this Court held that a racially segregated municipal park could not remain all-white by changing from public to private ownership. The Court's analysis turned in significant part on the fact that, despite the change in control, the appearance of government involvement in the park's racially discriminatory practices would remain. As the *Evans* Court stated:

> The momentum [the park] acquired as a public facility is certainly not dissipated *ipso facto* by the appointment of 'private' trustees .... Whether these public characteristics will in time be dissipated is wholly conjectural .... We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector.

Evans, 382 U.S. at 304; *see also San Francisco Arts & Athletics*, 483 U.S. at 557 (state action should be found because "in the eye of the public . . . the connection be-

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[3] In other doctrinal areas, the law looks beyond the formal status of an actor to hold responsible another party that is really in control of the undertaking. *See, e.g., Kreuger v. Mammoth Mountain Ski Area, Inc.*, 873 F.2d 222 (9th Cir. 1989)(master may be liable for negligence of servant under *respondeat superior* theory); *Esmark, Inc. v. N.L.R.B.*, 887 F.2d 739 (7th Cir. 1989)(shareholder may be liable for obligations of corporation where the corporation was a mere instrumentality or alter ego). The law also recognizes in other areas that an actor may take on added legal burdens by engaging in joint enterprises with other parties. *See, e.g., United States v. Douglass*, 780 F.2d 1472 (9th Cir. 1986)(each conspirator liable for criminal acts of other conspirators if reasonably foreseeable and done in furtherance of the conspiracy); *Stifle v. Marathon Petroleum Co.*, 876 F.2d 552 (7th Cir. 1989) (when injury results from negligence of multiple parties entire liability attaches to each party under theory of joint and several liability).

tween the decisions of the United States Government and those of the United States Olympic Committee is profound")(Brennan, J. dissenting); *id.* at 548 (contending that state action exists "largely for the reasons explained by Justice Brennan")(O'Connor, J., concurring in part and dissenting in part).

More recently, in its peremptory challenge cases, this Court based its findings of state action in part on the *appearance* that such challenges create of government participation in discrimination. In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, this Court considered whether civil litigants should be permitted to use peremptory challenges in a racially discriminatory manner. In holding that they should not, the Court noted that the discrimination has the appearance of involving the government and its system of justice simply by virtue of the location in which it occurs:

> [T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds .... To permit racial exclusion in this official forum compounds the insult inherent in judging a citizen by the color of his or her skin.

Id. at 628. Similarly, in *Georgia v. McCollum*, 505 U.S. __, 112 S.Ct. 2348 (1992), this Court noted that even when a criminal defendant uses peremptory challenges in a discriminatory manner, an unacceptable appearance is created of government complicity: "Regardless of who precipitated the jurors' removal, the *perception* and the reality in a criminal trial will be that the court has excused jurors based on race, an outcome that *will be attributed to the State*." *Id.* at 2356 (emphasis added).

Elsewhere in its constitutional jurisprudence, this Court has emphasized the importance of the government not appearing to act in an unconstitutional manner. In Establishment Clause cases, the Court frequently emphasizes that the government may not create the impression among its citizens that it is endorsing a particular religion or religion generally. In *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Court struck down a state law requiring a moment of silence in public schools in part because of the appearance it created: because the manner of the statute's enactment "convey[ed] a message of state approval of prayer activities in the public schools." *Id.* at 61. As Justice O'Connor wrote in a separate opinion: "The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in the public schools." *Id.* at 76.[4]

In this case, all three principles underlying the "mutual contacts" test militate strongly in favor of finding that Amtrak is a state actor. First, there can be no real doubt that Amtrak receives overt and significant assistance from the state. There are few, if any, nonpublic entities in this nation's history that have received Amtrak's munificent level of state assistance. Amtrak was created by Congress with $40 million in federal grants and $300 million in federal loans. In each of its 24 years of existence, the government has covered Amtrak's oper-

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[4] *See also School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 397 (1985)(invalidating program sending state teachers into sectarian schools in part because "[t]he symbolic union of church and state inherent in the [program] threatens to convey a message of state support for religion to students and to the general public"); *Lee v. Weisman*, 505 U.S. __, __, 112 S.Ct. 2649, 2678 (1992)("When public school officials, armed with the State's authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause")(Souter, J., joined by O'Connor, J. and Stevens, J., concurring).

ating deficits -- including congressional appropriations of more than $3 billion in the last five years alone. The government's assistance, moreover, goes far beyond these financial subsidies, significant as they are. Amtrak's principal properties, such as Penn Station, were acquired by the United States and the United States continues to hold the mortgages on them. In addition, Congress has vested Amtrak with the right of eminent domain, with exemptions from all state and local taxes, and with the ability to borrow under the credit of the federal government.

Furthermore, the purported justification for Amtrak's decision in this case was its concern over possible lost revenues from offended customers or advertisers. Here, as in *Burton*, that concern only highlights the interdependence between Amtrak and the government. Under the unique arrangement that first created Amtrak, any increase in the size of Amtrak's deficit also increases the size of the government's promised contribution.

No fair reading of these facts could lead to the conclusion, reached in *Rendell-Baker*, that respondent "is not fundamentally different from many private corporations whose business depends primarily on [government] contracts." 457 at 840-41. To the contrary, it seems abundantly clear that "without the overt, significant participation of the government . . . . [Amtrak] simply could not exist." *Edmonson*, 500 U.S. at 622.

Second, there is no question that the government exerts extensive control over Amtrak. Like the government assistance it receives, the degree of government control imposed on Amtrak is truly massive. It is not a question of a private actor feeling some level of subtle coercion from the state. The state's control of Amtrak reaches to its very core. The United States government owns all of Amtrak's preferred and voting stock. All of Amtrak's directors are appointed directly or indirectly by the President of the United States, including the Secre-

tary of Transportation, who serves on the board *ex officio*. Amtrak must report annually to Congress on its finances, and its financial records are audited by the Inspector General and subject to audit by the Comptroller General. As in *Little*, 452 U.S. 1, where state action existed because the state's involvement in the paternity proceeding was "considerable and manifest," here the government's involvement in and control over Amtrak's operations is so great that it is difficult to question seriously that the actions of Amtrak are effectively those of the government.

Finally, the ties between Amtrak and the state are such that the appearance is created for the public at large that the government is involved in unconstitutional activity. Amtrak may look to subtle statutory provisions and passages from corporate documents to make an argument that it is somehow distinct from the government. But these fine points are no doubt lost on most members of the public. Amtrak operates out of Penn Station, alongside two public authorities, New Jersey Transit (NJT) and the Long Island Rail Road (LIRR). LIRR and NJT facilities, such as ticket windows and information booths, are interspersed with Amtrak's throughout the station. Amtrak is also subject to the Freedom of Information Act, is defined as a "public entity" for purposes of the Americans with Disabilities Act, and is characterized in its own governing statute as a "mixed ownership government corporation." *Lebron*, 811 F. Supp. at 997. To a member of the public who is aware of even just these limited facts, there can be no real question that when Amtrak acts the "perception" will be that government is implicated and those actions "will be attributed to the State." *McCollum*, 112 S.Ct. at 2356.

The perils of holding that respondent is not a state actor are significant for First Amendment purposes. As the district court noted, if Amtrak is held not to be a state actor,

> [i]t would be free to exercise discriminatory control over the messages transmitted by its billboards. For example, as the Presidential election approached, Amtrak would have the absolute right to devote all of its billboards to champion the reelection of the incumbent president and warn of danger to the republic if the challenger should be elected .... Similarly, Amtrak would be free to sponsor advertisements on its billboards either opposing abortion or favoring choice; it could likewise advocate adherence to Catholicism and deprecate Protestantism, or vice versa, as it chose.

Lebron, 811 F.Supp. at 1000. It is hard to imagine that the reach of state action doctrine is so restricted that it would not prevent a President from using his power to appoint a majority of the Amtrak board, and then having that board turn around and use Amtrak's considerable resources to advocate its benefactor's policies and otherwise manipulate public opinion in a politically partisan way.

It does no damage to the principle that private conduct is outside of the reach of the Constitution to say that when government entanglements reach a certain point, state action will be found. This is not a case of a truly private actor being held to constitutional standards due to minor interactions with government. Here, the government undertook to underwrite a corporation with millions of dollars in grants and loans, to appoint its entire board, to control all of its voting stock, to buy and hold the mortgages on its major places of operation, and to spend billions of dollars paying off its operating deficits. Whatever the government chooses to call this corporation, this Court should have no hesitancy in calling it a state actor.

II. NO MORE STRINGENT STANDARD SHOULD BE USED TO FIND STATE ACTION IN FIRST AMENDMENT CASES THAN IS USED IN RACE DISCRIMINATION, GENDER DISCRIMINATION OR OTHER CONSTITUTIONAL CASES

The court below reached its decision that Amtrak was not a state actor in part by taking an unfounded and improperly narrow view of the level of protection First Amendment rights should be given in state action analysis. The court indicated that "a less stringent standard for finding state action should be applied when racial or sexual discrimination is at issue . . . than when there is a claim of a First Amendment violation." *See Lebron*, 12 F.3d at 392.

The Second Circuit's rationale for using a less exacting state action test for race and gender discrimination cases is essentially that those rights are more important than other rights. *See Weise v. Syracuse University*, 522 F. 2d 397, 405 (2d Cir. 1975).[5] Clearly, race and gender

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[5] The Second Circuit's adherence to differential tests for state action is long-standing. In *Grafton v. Brooklyn Law School*, 478 F.2d 1137 (2d Cir. 1973), the court found no state action in a law school's expulsion of a student for allegedly engaging in anti-war activities protected by the First Amendment. In holding that grants from the state to the law school did not make the school a state actor, the court stated:

> It could well be that such grants by the state, even though they represent only a small part of the cost of affording three years of legal training, would afford a ground for constitutional complaint if the charge here were an admission policy discriminating against racial or religious groups. But while a grant or other index of state involvement may be impermissible when it 'fosters or encourages' discrimination on the basis of race, the same limited involvement may not rise to the level of 'state action' when the action in question is alleged to affront other constitutional rights.

Id. at 1142.

discrimination are deeply offensive, and the right to be free from such discrimination is of paramount constitutional importance. But there is no basis -- and the court below provided none -- for holding that First Amendment rights are entitled to any lower level of protection than these or any other constitutional rights.

The Second Circuit's use of different state action tests for different constitutional rights cannot be reconciled with this Court's precedents. In its state action jurisprudence this Court has long used race and nonrace precedents interchangeably. For example, in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, a case involving due process rights of electric company customers, this Court did not hesitate to rely on state action cases involving race discrimination claims. *See id.* at 357-58 (citing *Burton v. Wilmington Parking Authority*, 365 U.S. 715 and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163); *see also Rendell-Baker v. Kohn*, 457 U.S. at 842-43 (employing *Burton* analysis in First Amendment case); *Blum v. Yaretsky*, 457 U.S. at 1010-11 (applying *Burton* analysis in due process case).

The differential state action approach endorsed by the Second Circuit is also inconsistent with the view of most circuits. At least four circuits have expressly declined to adopt different state action standards for different constitutional rights. *See Downs v. Sawtelle*, 574 F.2d 1, 6 n.5 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978); *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16, 19 (5th Cir.)(*en banc*), *cert. denied*, 429 U.S. 872 (1976); *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818 (7th Cir. 1975)(Stevens, J.), *cert. denied*, 425 U.S. 943 (1976); *Adams v. Southern California First Nat'l Bank*, 492 F.2d 324, 333 n.23 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974).

At least five additional circuits have, like the Supreme Court, implicitly rejected the Second Circuit's use of different state action tests depending on the right asserted by using race discrimination precedents in nonrace cases. *See, e.g., Wolotsky v. Huhn*, 960 F.2d 1331 (6th Cir. 1992)(applying *Burton* analysis in case involving due process and equal protection claims of homosexual); *Jackson v. Pantazes*, 810 F.2d 426 (4th Cir. 1987)(employing *Burton* analysis in Fourth Amendment case); *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987)(applying *Burton* analysis in First and Fifth Amendment case); *Anderson v. USAir, Inc.*, 818 F.2d 49 (D.C.Cir. 1987)(employing *Burton* analysis in Fifth Amendment case); *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94 (3d Cir. 1984)(employing *Burton* analysis in case raising First Amendment, due process, and gender discrimination claims), *cert. denied*, 471 U.S. 1015 (1985).

The flaw in the Second Circuit's approach, however, is more serious than a simple departure from prevailing judicial practice. It represents an erroneous approach to the whole issue of state action. The question in state action cases is whether the government is sufficiently involved with the private entity to trigger the application of constitutional standards. There is no logical reason that the degree of state involvement should depend on the underlying constitutional claim.

In addition, the Second Circuit's approach is wrong because in imposing a higher state action threshold on First Amendment claims than on Equal Protection claims, the court has assumed a hierarchy of constitutional values for state action purposes that does not exist, even in the Second Circuit, for adjudicating substantive constitutional claims. To the contrary, it is clear as a matter of substantive constitutional law that First Amendment rights are "fundamental" and that their abridgement triggers strict scrutiny. The same standard applies to constitutional claims of racial discrimination. Once state action is found, therefore, free speech claims and race discrimination claims are analyzed in similar ways. Given that fact, there is no justification for the

differential state action standard adopted by the Second Circuit. Nor is it benign. Rather, its unequal treatment of First Amendment claims represents a serious distortion of our most basic constitutional norms. *See, e.g., Downs*, 574 F.2d at 6 n.5 (even if court were to adopt differential tests for state action it "would be inclined to group infringements of fundamental rights and racial discrimination together for the purpose of state action analysis just as they receive comparable scrutiny in equal protection cases").

To say that First Amendment rights are entitled to the highest level of solicitude at every stage of the judicial process -- including the stage at which state action is determined -- is not to detract from the importance of race or gender discrimination claims. But it is to say that First Amendment rights do not belong in some category of rights that are less important or less worthy of protection.[6]

It is also not to say that in appropriate circumstances a court cannot engage in a ranking of constitutional rights. This Court has done so regularly in creating the

[6] In contrast to the Second Circuit, this Court has consistently declined to place either race discrimination or free expression higher on some abstract constitutional scale. In *R.A.V. v. St. Paul*, 505 U.S. __, 112 S.Ct. 2538 (1992), for example, this Court struck down on First Amendment grounds a city ordinance banning the display of symbols, including burning crosses, that arouse anger in others on the basis of race, color, creed, religion or gender. In holding that the ordinance impermissibly infringed on the right of free expression, the Court stated: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *Id.* at 2550.

"fundamental right" and "suspect class" categories under equal protection law. *See* Tribe, AMERICAN CONSTITUTIONAL LAW at §§16-1 -- 16-59. And even within particular rights, this Court has carved out levels of priority. *See, e.g., Virginia State Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976)(commercial speech accorded a lower standard of protection than noncommercial speech).

However, the difficult balancing of substantive rights that is sometimes required in constitutional adjudication should be done straightforwardly, on the merits, rather than by importing false distinctions into the state action doctrine that enable a court to avoid any consideration of the constitutional rights at stake. If this Court reverses the decision below, the case can be remanded and the trial court will then have ample opportunity to consider the constitutional claims fully -- not based on an abstract checklist of priorities, but based on the facts of the case before it.

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

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v.
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, NATIONAL WOMEN'S LAW CENTER, PEOPLE FOR THE AMERICAN WAY, PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., AND WOMEN'S LEGAL DEFENSE FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CONSENT OF PARTIES

Petitioner and respondent have consented to the filing of this brief pursuant to Rule 37.2 of the Rules of this Court.[1]

INTEREST OF AMICI

NAACP Legal Defense & Educational Fund, Inc., National Asian Pacific American Legal Consortium, National Women's Law Center, People for the American

---

[1] The letters of consent are being filed separately herewith.

Way, Puerto Rican Legal Defense and Education Fund, Inc., and Women's Legal Defense Fund (collectively the "Civil Rights Amici") are national organizations dedicated to protecting and promoting civil rights in the United States. In furtherance of that goal, the Civil Rights Amici have long fought to ensure that individuals have access to federal causes of action for violations of federal constitutional rights since such claims are a critical component of safeguarding those rights.

For more than 30 years, this Court's decision in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), has protected civil rights precisely because it rejected a mechanical, label-oriented approach for evaluating whether state action was present in particular instances of discriminatory or liberty-restricting conduct. Instead, the fact-specific test mandated by *Burton* elevates the substance over the form of a private actor's relationship with the State. In doing so, *Burton* has made an invaluable contribution to civil rights in this country and is an integral part of our civil rights enforcement fabric.

With the swipe of a pen, the divided Second Circuit has struck a potentially serious blow to civil rights in this country. Claiming in a footnote that *Burton* is in disfavor with some commentators, the court essentially disregarded *Burton*'s fact-specific test. In fact, it simply accepted Congress' simple statutory characterization of Amtrak as a nongovernmental entity.

The Second Circuit's superficial application invoked the words of *Burton* but not its spirit. Indeed, had the court considered the totality of the interrelationship between the National Railroad Passenger Corporation ("Amtrak") and the United States government with respect to the challenged decision, it clearly would have found state action since the facts relating to government involvement here are even more compelling than the facts in *Burton*. The decision below is of grave concern to civil rights organizations since it clearly shows the extent to which a formalistic state action doctrine can erect an insurmountable barrier for aggrieved persons who seek to redress constitutional injuries.

Accordingly, the Civil Rights Amici have a vital interest in having this Court reverse the Second Circuit's erroneous decision.[2]

SUMMARY OF ARGUMENT[3]

The Second Circuit erred to the extent that it failed to pierce the veil of Amtrak's putatively private conduct to perform the fact-intensive analysis mandated by this Court's decision in *Burton* v. *Wilmington Parking Authority*. Had the court truly considered the totality of the facts and circumstances, it would have found that the challenged conduct in the instant case constituted government action. This Court should reverse the decision below because it is inconsistent with this Court's longstanding application of the state action doctrine.

First, effective civil rights protection in the United States has depended in large measure on access to federal causes of action that prohibit all levels of government (federal, state, and local) from avoiding their constitutional obligations. This level of protection has been made possible to a great extent by application of the state action doctrine envisioned by the Framers of the Fourteenth Amendment and formalized in *Burton*. The decision below is contrary to the rationale of *Burton*; it is inconsistent with this Court's decisions that have consistently applied *Burton* and the intent of the Framers; and it disregards the historical importance of the state

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[2] Statements of interest submitted by the individual amici are included in an appendix hereto.

[3] To avoid unnecessary duplication, the Civil Rights Amici will not add to the argument of amicus American Civil Liberties Union —a position with which Civil Rights Amici agree—that the amount of state involvement necessary to establish state action should not be greater for First Amendment claims than for equal protection claims.

action doctrine in the enforcement of civil rights in this country.

Second, the underlying rationale of *Burton*—that a court must consider and weigh all facts and circumstances to determine nonobvious state involvement—is particularly urgent at the present time since there is a trend at all levels of government to delegate a wide variety of public functions to private corporations and entities. As the line between public and private functions becomes increasingly blurred, the need for continued vigorous application of the *Burton* fact-specific approach is even more critical to preserving the ability of individuals to redress deprivations of their constitutional rights. This need is particularly great because a number of these newly delegated public functions have not been "traditionally exclusively reserved to the State" and would therefore likely not amount to state action under this Court's public function test. *See Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974).

ARGUMENT

I. THIS COURT SHOULD REJECT THE CIRCUIT COURT'S EVISCERATION OF THE *BURTON* DECISION BECAUSE THE *BURTON* STANDARD FOR IDENTIFYING STATE ACTION ACCURATELY REFLECTS THE INTENT OF THE FOURTEENTH AMENDMENT AND HAS BEEN AN ESSENTIAL FACTOR IN GUARANTEEING EQUAL RIGHTS

In *Burton*, this Court applied a fact-specific and flexible analysis of state action to hold that a privately owned restaurant leasing public space was a state actor because of its interdependent relationship with the government. In the instant case, the Second Circuit Court of Appeals suggested that *Burton* has limited continued vitality. Although the court referred to *Burton* on occasion, it clearly failed to perform the "sifting [of] facts and weighing [of] circumstances" mandated by *Burton*. As demonstrated below, the Second Circuit's formalistic application of the state action doctrine disregards this Court's decisions and

the doctrine's historical and ongoing importance for safeguarding individual rights and liberties.

A. The State Action Doctrine Is Essential In Guaranteeing Equal Rights

The state action doctrine operates on two levels. On one level, a finding of state action means that the Constitution constrains the challenged conduct, even if the conduct is allegedly private. *See Burton*, 365 U.S. at 726. On a second level, a finding that certain conduct involves state action allows aggrieved plaintiffs to bring suit to challenge such conduct under federal civil rights causes of action, particularly under Section 1983 (42 U.S.C. § 1983) and under the *Bivens*[4] doctrine, to enforce the right of equal protection under the laws and other constitutional rights. *See, e.g., Monroe* v. *Pape*, 365 U.S. 167 (1961).[5] In the absence of a finding of state action, civil rights plaintiffs are relegated to other causes of action not necessarily tailored to the specific injuries they have suffered, except when legislation creates such claims. Moreover, defendants are freed from all constitutional restraints on their behavior.

Access to federal causes of action to redress constitutional violations plays a central role in protecting civil rights and in holding governmental actors accountable for their actions. Without a sufficiently flexible state action doctrine, many of the injuries to aggrieved plaintiffs would go unremedied or underremedied. The fact-specific test articulated in *Burton* allows individuals to redress injuries to their civil rights, even when the State is clothed in the robes of a private entity. In reviewing the instant case, this Court should be mindful of the significant role

[4] In *Bivens* v. *Six Unknown Federal Agents*, 403 U.S. 388 (1971), this Court afforded the plaintiff a cause of action against federal officials for violating his Fourth Amendment rights.

[5] While the doctrine can be viewed on two levels, courts use the same analysis in making the state action determination in either situation. *United States* v. *Price*, 383 U.S. 787, 794 n.7 (1966).

a fact-bound state action doctrine has historically played in preserving constitutional rights and liberties. *See* discussion, *infra*, at Part I.C.

1. *This Court's historic state action decisions have allowed the enforcement of civil rights in a manner that reflects the intent of the Framers of the Fourteenth Amendment*

When Congress enacted the Fourteenth Amendment, it believed that the amendment's provisions would allow Congress to fashion remedies to address private discriminatory action. Thus, Congress enacted numerous civil rights statutes between 1868 and 1875 that regulated private conduct to protect individual rights. *See generally* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323 (1952) (detailing history of post-Civil War amendments and civil rights statutes). Congress intended these statutes to redress civil rights abuses effected by private persons who did not necessarily act with express authorization of the state, but whose activity the state would not or could not prevent. *See* Harry A. Blackmun, *Section 1983* and *Federal Protection of Individual Rights—Will the Statute Remain or Fade Away?*, 60 N.Y.U. L. Rev. 1, 5 (1985).

In *The Civil Rights Cases*, 109 U.S. 3 (1883), the Supreme Court limited causes of action under the civil rights statutes to those arising as a result of state action, holding that the provisions of the Fourteenth Amendment applied only to states and not to private individuals. *Id.* at 11. In its earliest interpretations of what constitutes state action, the Court narrowly construed state action as conduct expressly authorized by the state. *See, e.g., Ex Parte Virginia*, 100 U.S. 339 (1879).

This narrow interpretation of state action largely atrophied federal enforcement of civil rights. As then Justice Blackmun noted, following *The Civil Rights Cases* and the national move toward reconciliation, segregation laws spread from railways to streetcars, restaurants, bathrooms, and neighborhoods. Blackmun, *supra*, at 11. With but few exceptions, the only significant inroads into Jim Crow laws came in the area of voting rights, where a clear constitutional mandate existed in the Fifteenth Amendment. *See, e.g., Lane* v. *Wilson*, 307 U.S. 268 (1939); *Myers* v. *Anderson*, 238 U.S. 368 (1915). In fact, only 21 reported cases were decided under Section 1983 prior to 1920. *Maine* v. *Thiboutot*, 448 U.S. 1, 27 (1980) (Powell, J., dissenting).

After World War II, however, it became clear that a narrow interpretation of state action permitted violations of constitutional rights. Thus, the Court properly held in a series of cases that constitutional limitations applied to activity that may previously have been characterized as private action. For example, this Court found a company to be a state actor when it restricted freedom of speech on the streets of a town it owned. *Marsh* v. *Alabama*, 326 U.S. 501 (1946). Similarly, this Court held state court enforcement of a private racially restrictive covenant to be state action for constitutional purposes. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). Moreover, this Court found a private detective who held a special police officer's card issued by the city to be a state actor when he coerced the confessions of suspects to a crime he had investigated. *Williams* v. *United States*, 341 U.S. 97 (1951). These holdings built on this Court's earlier decisions that a government official is a state actor when his actions, though not specifically authorized by the state, are nonetheless clothed with governmental authority. *See, e.g., Screws* v. *United States*, 325 U.S. 91, 109-10 (1945).

This developing concept of state action analysis better reflected the original intent of the Framers of the Fourteenth Amendment and the drafters of Section 1983. *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961). Thus, the Court in *Monroe* v. *Pape* held that Section 1983 provided individuals with an effective means of redressing

deprivations of their civil rights. *Id.* at 185.[6] Moreover, this Court recognized the link between a finding of state action and the need to make federal causes of action and remedies available to victims of civil rights abuses.

2. *A flexible state action doctrine is inexorably tied to the ability of aggrieved individuals to redress violations of their constitutional rights*

Section 1983 and *Bivens* causes of action have come under recent attack from those who seek to curtail the ability of individuals to redress violations of their constitutional rights. *See* Blackmun, *supra*, at 2. One way to limit access to these causes of action is to employ a narrow, cramped definition of state action. Affirming the decision below would have precisely this effect.

Such a turn of events would upend the constitutional status quo and would revive the misguided interpretation of the Fourteenth Amendment that, between 1890 and 1940, confounded the Framers' intent and eviscerated enforcement of constitutional rights. Those persons and entities that previously would have been state actors under a pragmatic form of analysis would no longer be bound by the Constitution. The threat of private suits under Section 1983 and *Bivens* would no longer deter these actors from infringing on individual rights.

Moreover, aggrieved individuals would likely have no way to redress injuries to their constitutional liberties. While these individuals might bring suit under some other state or federal cause of action, remedies for these claims would often prove insufficient to redress specific constitutional injuries. *See Bivens*, 403 U.S. at 392-94 (1971). As recognized in *Bivens*, a court must tailor remedies to redress the specific injury claimed. *Id.* at 392 (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)). In fact, the

[6] In its analysis, the Court detailed the legislative history indicating a strong intent to apply Section 1983 to a broad range of actors. *See Monroe*, 365 U.S. at 173-83.

federal right may be founded on interests that differ or may indeed be inconsistent with those interests underlying any alternative claims. *See Bivens*, 403 U.S. at 392-94.[7] Thus, any federal remedy for a constitutional injury supplements other available remedies. *Monroe*, 365 U.S. at 1203. Continued access to these federal remedies is essential to ensure the ongoing vitality of individual rights under the Constitution.

B. Affirming The Second Circuit's Decision Would Seriously Undermine *Burton*

In *Burton*, this Court articulated the principle, well-grounded in prior decisions,[8] that each case raising the state action issue is unique and "necessarily [requires a] fact-bound inquiry." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 939 (1982) (citing *Burton*). *Burton* required courts to apply a flexible rather than a mechanical ap-

[7] In the instant case, one might suggest that Mr. Lebron could sue Amtrak for breach of contract. The policies underlying contract law, however, differ from those underlying the First Amendment. Contract law enforces the reasonable expectations of the parties while the First Amendment promotes representative self-government, a marketplace of ideas, and individual liberty and autonomy. *See, e.g.*, 1 E. Allan Farnsworth, *Farnsworth on Contracts* § 1.3, at 11 (1990); Gerald Gunther, *Constitutional Law* 1001-02 (11th ed. 1990). In the context of the present case, a private individual would be liable only under contract law for breaching because of the other party's political viewpoint, but when the breaching party is the government, the First Amendment puts different interests into play that deserve redress beyond the scope of contract law.

[8] *See, e.g., Marsh* v. *Alabama*, 326 U.S. 501 (1946) (company treated as state actor regarding restrictions on First Amendment rights to use sidewalks to distribute literature in company town); *Public Utils. Comm'n* v. *Pollak*, 343 U.S. 451 (1952) (private bus company's practice of playing radio programs on buses constituted state action where public utilities commission had reviewed practice and permitted it to continue); *Terry* v. *Adams*, 345 U.S. 461 (1953) (all-white preprimary election within private club treated as state action). As these cases demonstrate, state action jurisprudence of the *Burton* type has never been limited to Fourteenth Amendment issues.

proach in state action cases. The rationale of the *Burton* Court as it pertained to the Equal Protection Clause is no less true for the First Amendment, and no less applicable today:

> Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an "impossible task" which "[t]his Court has never attempted." *Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.*

365 U.S. at 722 (quoting *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U.S. 552, 556 (1947)) (emphasis added).

Burton's facts are set out at length in the petitioners' brief. After careful review of those facts, this Court found that the following indicia of governmental control were present: the land and parking garage building where the restaurant was located were publicly owned and dedicated to "public uses"; maintenance of the building was the responsibility of the Parking Authority; the restaurants's lease was "a physically and financially integral and, indeed, indispensable part of the State's plan" to finance the garage; and the exempt status of the garage redounded to the benefit of Eagle Coffee Shoppe. *Id.* at 723-24. This Court further found that the state "had elected to place its power, property and prestige behind the . . . discrimination." *Id.* at 725. The Court reasoned that because the state could have included provisions in the lease that would have "affirmatively required Eagle to discharge the responsibilities [of the state] under the Fourteenth Amendment," the state had a duty to do so.

It could not "effectively adbicate its responsibilities by . . . ignoring them;" without running afoul of the Constitution. *Id.* Because of these links between the Parking Authority and Eagle, the Court held that

> [t]he State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

Id.

The petitioner and the District Court have each dealt at length with the numerous facts that support a finding that the challenged action in the instant case may be fairly attributable to the government. We will not rehearse Amtrak's interrelationship with the government here. Suffice it to say that if the Eagle Coffee Shoppe was so intertwined with the government as to make its actions the actions of the State, *id.*, then the respondent cannot reasonably be viewed for First or Fourteenth Amendment purposes as anything less than a governmental actor. As well put by the District Court, "in both image and reality [the respondent] is impregnated with governmental character and inseparably intertwined with governmental authority and financing." *Lebron*, 811 F. Supp. at 997.

The majority below has attempted to avoid the binding effect of *Burton* by mentioning that decision but not applying the pragmatic test it mandates. The majority justified its superficial review of the facts with a lone footnote stating that "[s]ome commentators have suggested that more recent Supreme Court cases . . . have curtailed Burton's precedential authority." *Lebron*, 12 F.3d at 391 n.1. Surely, the principle of *stare decisis* demands greater respect for—and more deference to—the substantial body of decisional law affirming the *Burton* approach. We respectfully submit that the panel majority's attempt to unsettle decades of precedent should have been premised

on more than the mere musings of "some commentators." [9]

In stark contrast to the divided panel's superficial treatment of *Burton*, this Court has consistently applied meaningful fact-specific state action analysis. This Court's decision in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), illustrates this point.[10] *Moose Lodge* involved

[9] The Second Circuit cited four cases as the legal authority for this alleged trend away from *Burton* jurisprudence. These cases show no such trend. In fact, the two decisions of this Court cited by the majority clearly show that this Court consistently has applied *Burton*.

In *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U.S. 522 (1987), this Court never expressly overruled *Burton*, nor did it criticize *Burton* as the Second Circuit's footnote suggests. To the contrary, in each case the Court applied the *Burton* fact-specific test. In *Jackson*, this Court concluded the facts and circumstances did not mandate that a private utility corporation be deemed a governmental actor. *Jackson*, 419 U.S. at 357-58. See discussion of the *San Francisco Arts* decision, *infra* at 13-14.

Similarly, *Adams* v. *Vandemark*, 855 F.2d 312 (6th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989), and *Imperiale* v. *Hahnemann Univ.*, 776 F. Supp. 189 (E.D. Pa. 1991), *aff'd*, 966 F.2d 125 (3d Cir. 1992) (per curiam), are inapposite. In *Adams*, the challenged conduced was the termination of plaintiff's employment in a private industry regulated by the government. *Hahnemann* involved the revocation of a medical degree by a private medical school.

[10] Other, more recent examples include *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614 (1991) (exercise of peremptory challenges to exclude jurors on account of their race is state action); *Tulsa Professional Collection Serv., Inc.* v. *Pope*, 485 U.S. 478, 486 (1988) ("[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found."); *Lugar*, 457 U.S. at 942 (state action through "joint participation" of government and private citizen exists when states creates procedures whereby state officials may attach property on *ex parte* application of one party to a private dispute). *Cf. National Collegiate Athletic Ass'n* v. *Tarkanian*, 488 U.S. 179 (1988) (state university's imposition of disciplinary proceedings against basketball coach in compliance with NCAA rules did not turn NCAA's conduct into state action).

the refusal of a private club to serve food and beverages to a black guest of a club member. Although the parties had *stipulated* that the club "is in all respects, private in nature and does not appear to have any public characteristics," *id.* at 179 n.1 (Douglas, J., dissenting), the Court did not merely accept at face value this stipulation. Rather, the majority expressly applied the *Burton* test, but found that on the specific facts of the case, "there [was] nothing approaching the symbiotic relationship between [the parking authority] and [the restaurant] that was present in Burton." *Id.* at 175.

Importantly, the *Moose Lodge* majority cited *Burton* for the principle that facts must be sifted and circumstances weighed in order to determine whether particular discriminatory conduct constitutes private or state action. *Id.* at 173. The finding that the liquor licensing procedure failed to change the character of the club's act from private to public was not an assumption based upon blind acceptance of the club's label as "private," or even of the parties' stipulation to that effect; instead, both the opinion of the majority and those of the dissenters involve scrutiny and interpretation of the particular facts of the case, as *Burton* requires.

In attempting to deny the Court's continuing reliance on the flexible *Burton* test, the Second Circuit erroneously referred to *San Francisco Arts & Athletics* v. *United States Olympic Committee*, 483 U.S. 522 (1987). That case was one in which the U.S. Olympic Committee ("USOC") sought an injunction to prevent San Francisco Arts and Athletics from using the word "Olympic" and the symbol of the International Olympic Committee in promoting the "Gay Olympic Games."

As in *Moose Lodge*, the Court recognized at the outset that the actor in question was a private entity, *id.* at 543-44, yet both the majority and the dissenters made that fact the point of departure rather than the end of

their inquiry.[11] Of particular importance to the majority's finding of an absence of state action was the fact that, during the 1980 boycott of the Moscow Olympics, the President and the federal government were unable to exercise "any type of 'de facto' control over the USOC"; they had to rely on persuasion to secure the USOC's participation in the boycott.[12] *See id.* at 545 n.27. Thus, the issue was not whether the USOC was chartered as a private corporation, but whether it "can or does" *function* as one. *Id.* at 546 n.29. The flexible, fact-specific approach of *Burton* jurisprudence was necessary to make such a determination.

As these cases reveal, on several occasions the Court used the *Burton* test and determined that the actor in question was purely private and therefore not subject to constitutional restrictions. *See, e.g., Moose Lodge*, 407 U.S. at 173-75; *Tarkanian*, 488 U.S. at 195. But even in those cases, the *Burton* approach was essential in making an informed assessment of whether there was a " 'sufficiently close nexus between the State and the challenged action . . . so that the action of the [private actor] may fairly be treated as that of the state itself.' " *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982) (quoting *Jackson*, 419 U.S. at 351). Even in cases that seemed on their face to involve purely private action, this Court has held time and time again that the constitutional rights at stake

[11] *See San Francisco Arts*, 483 U.S. at 548 (O'Connor, J., concurring in part and dissenting in part) (arguing that facts and circumstances support a finding that USOC and government "are joint participants in the challenged activity and as such are subject to the equal protection provisions of the Fifth Amendment"); *id.* at 548-49 (Brennan, J., dissenting) (reasoning that USOC is governmental actor because it "performs important governmental functions," and because there exists a "sufficiently close nexus" between government and action of USOC).

[12] Of course, it is just such *de facto*, and indeed *de jure*, government control of Amtrak that Judge Leval found to exist in the instant case. *Lebron*, 811 F. Supp. at 997-98.

are important enough to warrant taking a hard look to ensure that such appearances are not deceiving.

This Court has consistently rejected the panel majority's view that the incidental labeling of an entity as "non-governmental" is sufficient to insulate its actions under all circumstances from the constitutional strictures. To affirm the decision of the court below would threaten to unravel this Court's carefully wrought state action jurisprudence and leave lower courts without guidance for evaluating future claims of quasi-state action. This evisceration of *Burton* would reverse a long history of safeguarding civil liberties and civil rights that ensured that all indicia of public control would be considered in making state action determinations.

C. A Fact-Specific Approach To State Action Has Historically Allowed Courts To Defeat Attempts By Governments To Privatize Traditional Public Services As A Pretext For Avoiding Constitutional Obligations

Though theoretical in its conception, this long-standing history of a fact-intensive state action doctrine has had quite tangible consequences. In the aftermath of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), many southern states and localities attempted to avoid their constitutional obligation to desegregate by "privatizing" traditional government services, such as transportation, education, and parks and recreational facilities. The flexible, fact-intensive approach to state action adopted by this Court and by the lower federal courts played a critical role in ending "massive resistance" to desegregation in the South.

1. *Public Transportation*

On December 1, 1955, Rosa Parks refused to relinquish her seat and move to the back of a public bus in Montgomery, Alabama. Her act of civil disobedience ignited a year-long struggle in Montgomery—the Mont-

gomery bus boycott—that culminated in a Supreme Court decision, *Gayle* v. *Browder*, 352 U.S. 903 (1956), ending segregation on the city's buses and effectively overruling the discredited doctrine of "separate but equal" announced in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

In the aftermath of the *Browder* decision, and as part of the southern strategy of massive resistance to desegregation, local officials in Birmingham, Alabama devised a scheme to keep segregation intact on the city's buses. On the day that the old segregation ordinances in Birmingham were repealed, the city enacted a new ordinance giving the local bus company the power to " 'promulgate such rules and regulations for the seating of passengers on public conveyances . . . as are reasonably necessary to assure the speedy, orderly, convenient, safe and peaceful handling of passengers.' " *Boman* v. *Birmingham Transit Co.*, 280 F.2d 531, 532-33 (5th Cir. 1960) (quoting the new ordinance). The new ordinance also provided that a willful refusal to obey the request of a driver enforcing the company's seating policy constituted a breach of the peace. *Id.* at 533. After the city promulgated its new ordinance, the bus company painted signs in the front and rear of its buses that read: "White Passengers Seat From Front, Colored Passengers From Rear." Soon after the signs were painted, a group of blacks disregarded them by occupying seats near the front of a bus. When the blacks refused to obey the driver's request that they move to the back, they were arrested for breach of the peace and related infractions. They subsequently sued the bus company and the Birmingham Board of City Commissioners, claiming that the signs violated the Constitution by designating seating according to race. *Id.* at 532-33.

The federal District Court held that the racially designated seating did not violate the constitutional rights of the plaintiffs because it did not constitute state action.[13]

[13] The District Court's decision is reprinted in 4 Race Rel. L. Rep. 1027 (1959).

The District Court found that "[t]he evidence wholly fails to reveal that [city officials] had formed any policy, actually or tacitly, to apply [the new ordinance] in a racially discriminatory manner." [14]

A divided Fifth Circuit panel reversed the District Court's judgment. The court held that because the bus company was a public utility holding a special franchise to operate on the city's streets, state action was present. *Boman*, 280 F.2d at 534.

The Fifth Circuit's courageous decision marked an important victory for the civil rights movement. No longer could city officials resist their constitutional obligation to desegregate by privatizing an essential public service. A narrow and inflexible conception of state action would have left the plaintiffs in *Boman* at the mercy of county and bus company officials determined to maintain the Jim Crow regime. If the Birmingham Transit Company is a state actor because it holds a special franchise to operate on the city's streets, then Amtrak, created, controlled, and subsidized by the federal government, should likewise be deemed a government actor. For this Court to hold otherwise would diminish the importance of decisions like *Boman* and *Burton* in protecting civil rights.

2. *Public Education*

In the field of public education, efforts to desegregate also met with massive resistance in the South. Many southern states and localities attempted to avoid the command of *Brown* v. *Board of Education* by closing the public schools and setting up programs to facilitate segregation by private schools and organizations.

The Supreme Court confronted one county's effort to privatize its public schools in *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964).

[14] Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 Yale L.J. 999, 1059 (1989).

When the supervisors of Prince Edward County, Virginia were faced with a court order to desegregate their schools, they refused to levy any school taxes for the 1959-1960 academic year. As a result, the county's public schools did not open. *Id.* at 222-23. A private group, the Prince Edward School Foundation, was formed to operate private schools for white children in the county. *Id.* at 223. During the 1959-1960 school year, those schools were supported entirely by private contributions. However, in 1960, the Virginia General Assembly adopted a tuition grant program making every child, regardless of race, eligible for certain tuition grants to attend private schools or public schools outside his locality. The program also authorized localities to provide their own grants. The Prince Edward Board of Supervisors then passed an ordinance providing further tuition grants to children attending the Prince Edward School Foundation's schools. *Id.*

This Court held that the Prince Edward County School Board's decision to close the county's public schools, while contributing to the support of the private, segregated white schools that replaced them, denied black students the equal protection of the laws. *Id.* at 232. While the Court did not specifically address the state action issue, it found that because the Prince Edward public schools had been closed for an invidious reason—to keep the school district segregated—the Board's action violated the equal protection clause. *Id.*[15]

[15] Although the *Griffin* Court's holding was based in part on a finding of invidious purpose, this Court has never held that an intent or purpose to evade constitutional limitations is required for a finding of state action. *See Burton*, 365 U.S. at 725 & n.2 ("It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith"); *Wimbish* v. *Pinellas County*, 342 F.2d 804 (5th Cir. 1965) (state action found where county leased land for golf course to private tenant who discriminated against blacks, notwithstanding the fact that county had no discriminatory purpose in executing the lease). *See also Muir* v. *Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954), in which a city leased its amphitheater for the summer to a private party who denied admission to blacks. No discriminatory purpose on the city's part was shown. Nevertheless, the Supreme Court vacated a lower court decision denying relief to the blacks.

The *Griffin* Court cited an earlier case, *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961), in which the District Court invalidated a Louisiana statute that provided "a means by which public schools under desegregation orders may be changed to 'private' schools operated in the same way, in the same buildings, with the same furnishings, with the same money, and under the same supervision as the public schools." *Id.* at 651. This Court affirmed the District Court's judgment invalidating the Louisiana statute as a denial of equal protection. *St. Helena Parish Sch. Bd.* v. *Hall*, 368 U.S. 515 (1962).[16]

While *Griffin*, *Hall*, and *Cooper* did not directly discuss the state action issue, all three cases are significant here because this Court was firm in rejecting attempts to preserve segregation through the privatization of public services. Rather than adopting a narrow and rigid approach to state action, the Court looked to larger constitutional principles in holding that the state cannot delegate an essential governmental function to private entities to circumvent the command of the Fourteenth Amendment.

3. *Public Parks and Recreational Facilities*

This Court has long resisted attempts to privatize other public faciliites in order to avoid the requirements of the Constitution. *Evans* v. *Newton*, 382 U.S. 296 (1966), illustrates the approach that the Court has traditionally

[16] In an earlier case, *Cooper* v. *Aaron*, 358 U.S. 1 (1958) (also cited in *Griffin*), the Supreme Court denied Arkansas' application to suspend a judicially approved school integration plan for the city of Little Rock, explaining that, "[s]tate support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." *Id.* at 19.

taken in such cases. In 1911, Senator Bacon devised land to Macon, Georgia, to be used as a park for whites only. After this Court's decision in *Pennsylvania* v. *Board of Trusts*, 353 U.S. 230 (1957) (finding state action when public officials act as trustees under a private will requiring racial discrimination), the city permitted blacks to use the park. Bacon's heirs and others sued to remove the city as trustee; black citizens intervened in opposition; the city resigned as trustee; and the Georgia courts accepted the city's resignation and appointed private individuals as trustees so that the trust's purpose would not fail.

Justice Douglas, writing for the Court, reversed. Because of the city's historic role in maintaining the park, and because the park served a public function, it was subject to the requirements of the Fourteenth Amendment regardless of who had title to the park under state law:

> The momentum [the park] acquired as a public facility is certainly not dissipated ipso facto by the appointment of "private" trustees. . . . If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment just as the private utility in *Public Utilities Commission of District of Columbia* v. *Pollak*, 343 U.S. 451, 462 [(1952)], 72 S.Ct. 813, 96 L.Ed. 1068, remained subject to the Fifth Amendment because of the surveillance which federal agencies had over its affairs.

Id. at 301-02.

The *Evans* Court relied on *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952). In *Pollak*, as in this case, the Court considered whether a public utility operating under the authority of Congress was a government actor. In finding government action, the Court noted:

> [W]hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.

Id. at 462 n.8 (quoting *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 401 (1950)).[17]

This Court followed the reasoning of *Evans* in *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974). In *Gilmore*, the city of Montgomery granted exclusive possession and control of its recreational facilities to all-white private schools and groups affiliated with such schools in an effort to circumvent this Court's desegregation rulings in the area of public recreation. Because Montgomery's scheme had the effect of creating enclaves of segregation and depriving blacks of equal access to parks and recreational facilities, this Court held that the lower courts had correctly enjoined it. *Id* at 566-69.

A superficial application of the state action doctrine in these cases would have permitted state and local governments to delegate control of public land and facilities to "private" entities determined to maintain segregation. Such a result would have left America's parks, golf courses, beaches, and other public areas closed to individuals who happened to be of the "wrong" color.

As this survey demonstrates, a pragmatic, fact-specific state action test has enabled individuals to protect their constitutional rights. Forty years ago, in *Brown* v. *Board of Education*, this Court noted:

> In approaching this problem [the effect of segregation on public education], we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy* v. *Fergu-*

[17] The similarities between *Pollak* and *Lebron* are striking. Both cases involve state action and First Amendment issues. Amtrak, like the bus company whose conduct was at issue in *Pollak*, (1) operates as a public utility under the authority of Congress; (2) enjoys a virtual monopoly in the services it provides; (3) is controlled by a federally appointed Board that is responsible for the challenged conduct; and (4) is subject to regulatory supervision under agencies authorized by Congress.

> *son* was written. We must consider public education in light of its full development and its present place in American life throughout the Nation.

347 U.S. at 492-93. Similarly, this Court must not turn the clock back on decades of state action jurisprudence.

II. *BURTON* MUST NOT BE UNDERMINED AT A TIME WHEN GREAT FLEXIBILITY IS NEEDED TO ADDRESS THE INCREASINGLY "NONOBVIOUS INVOLVEMENT OF THE STATE IN PRIVATE CONDUCT"

A. There Is A Current Trend Toward Privatization Of Public Services

Today, increasing privatization of essential services traditionally provided by governments has created complex private-state relationships that have in some instances virtually eliminated the distinction between the public and private sectors.[18] In this time of changing relationships between the private and public sectors, it is imperative that this Court vigorously apply the *Burton* test and thereby continue to look beyond the form of an entity to its substance to discern whether the specific facts of each case require a finding of state action.

The past two decades have seen an increasing trend among all levels of government to delegate essential public services to the private sector. Such privatization creates amalgams of public and private entities to carry out government functions in a variety of arrangements that are not formally governmental. These entities, however, provide services at the behest of governments, often

[18] *See* Ronald C. Moe, *Exploring the Limits of Privatization*, 47 Pub. Admin. Rev. 453, 456 (1987) (describing Federal Assets Disposition Association, a corporation created by private citizens under Colorado law with capital provided by Federal Savings and Loan Insurance Corporation, a federal agency, as " 'crypto-quasi-pseudo' entity living precarious existence in the twilight zone between the public and private sectors" that "seeks to be private in its direction and interests but public in its rights and privileges").

under significant government control, and in reliance on vast public resources. "What occurs, in variant forms, is the emergence of 'third-party government.' " Moe, *supra* note 18, at 457.

Broad areas of services traditionally provided by the public sector have been targets of privatization efforts. In 1988, the President's Commission on Privatization recommended privatization in one form or another of a broad spectrum of federal government activities including low-income housing, housing finance, federal loan programs, air traffic control, education, postal services, Medicare, and urban mass transit. President's Commission on Privatization, *Privatization: Toward More Effective Government* (1988). Indeed, the President's Commission included Amtrak in its study and recommended a set of initiatives designed to place Amtrak in the *private* sector. *Id.* at 172-75.

Many localities have authorized privatization of their public schools, either by granting charters to private companies to operate schools or by contracting with private companies to manage public schools. *See Private Management of Public Schools*, 4 C.Q. Researcher 265 (1994). While these schools are operated by the private sector, they are publicly funded, use public facilities, and are subject to government regulation. Such initiatives are currently being implemented or considered in Arizona, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Ohio, Tennessee, Texas, Virginia, Wisconsin, and the District of Columbia. *Id.* at 273; *see also* Mary Jordan, *Charter Group Banking on a Profitable National Network of Elite Schools*, Wash. Post, Apr. 30, 1994, at A8.

Correctional facilities similarly have been subject to privatization efforts. As of 1992, there were sixty privately operated prisons throughout fourteen states. *Pri-*

vatization, 2 C.Q. Researcher 977, 985 (1992).[19] Other essential services traditionally provided by the public sector that are the subject of privatization efforts include police protection, water supply and treatment, solid waste collection, roads and other infrastructure, and health care.[20]

The impetus for privatization efforts stems from the belief that the private sector can deliver services with increased efficiency and economy.[21] Even though malevolent intent is not the driving force as it was in those cases discussed in Part I.C., in which this Court found privatization to be impermissible, the threat of circumventing constitutional obligations is a common thread. Proponents of privatization point to substantial cost savings from avoiding constitutional constraints as one of the principal economic benefits of privatization. As one commentator noted:

> One of the attractions of prison privatization for state and local governments is the belief that contracting prison management to private firms will relieve the government of the burden of defending the multitude of individual and class-wide civil rights actions and the expense of complying with compre-

[19] These numbers represent growth in the number of private correctional facilities that has increased dramatically over the past few years. Samuel J. Brakel, *Private Corrections, in Privatizing the United States Justice System: Police, Adjudication, and Corrections Services from the Private Sector* 254, 254 (Gary W. Bowman *et al.* eds., 1992).

[20] *See generally* Robert A. Dorwart & Sherrie S. Epstein, *Privatization and Mental Health Care: A Fragile Balance* (1993); E.S. Savas, *How to Shrink Government: Privatizing the Public Sector* (1982); *Privatizing the United States Justice System, supra* note 19.

[21] *See, e.g.*, E.S. Savas, *supra* note 20; James K. Stewart, *The Justice System and the Private Sector: Time for an Expanded Partnership, in Privatizing the United States Justice System, supra* note 19, at 2.

> hensive and often financially burdensome court orders.[22]

Another commentator described the impact of privatization on constitutionally protected rights:

> By turning production of public services over to private agencies, governments can effectively evade most constitutional restraints. . . . To political leaders or public administrators who view constitutional due process requirements as onerous limits on the efficiency of government agencies, the possibility of escaping such restraints can only add luster to the possibilities of privatization.[23]

Privatization of numerous public services further blurs the distinction between the private and public sectors. While some "privatized" public services may not constitute state action under the *Burton* test, others will. "The Government is free, of course, to 'privatize' some functions it would otherwise perform. But such privatization ought not automatically release those who perform Government functions from constitutional obligations." *San Francisco Arts*, 483 U.S. at 560 (Brennan, J., dissenting). Therefore, a searching state action inquiry consistent with *Burton* is imperative to penetrate the formal structure of an entity and to discern whether its substance reveals state action. This need is particularly great since, as discussed below, many privatized functions involve public services that have not been exclusively provided by the State in the past and accordingly may not be deemed to be state action under this Court's exacting public function test.

[22] Susan L. Kay, *The Implication of Prison Privatization on the Conduct of Prisoner Litigation Under 42 U.S.C. Section 1983*, 40 Vand. L. Rev. 867, 868 (1987).

[23] Harold J. Sullivan, *Privatization of Public Services: A Growing Threat to Constitutional Rights*, 47 Pub. Admin. Rev. 461, 464-65 (1987).

B. In The Absence Of *Burton*, This Trend Towards Privatization Will Immunize Broad Categories Of Conduct Properly Subject To Constitutional Constraints

Without the *Burton* fact-specific test, the trend towards privatization of public functions will create a dangerously wide void in the state action doctrine. The problem is compounded because the public function test, the only state action test most likely to be applicable to privatized public services in the absence of *Burton*, has been interpreted as an exacting, "static" standard that is not sufficiently flexible to "resemble contemporary experience." *San Francisco Arts*, 483 U.S. at 549 n.1 (Brennan, J., dissenting).

To establish state action under the public function test, a private entity must be engaged in a function that has been "traditionally exclusively reserved to the State." *See, e.g., San Francisco Arts*, 483 U.S. at 545; *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 842 (1982); *Blum*, 457 U.S. at 1011; *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 158 (1978); *Jackson*, 419 U.S. at 352. Some of the public functions being delegated to the private sector, such as prisons, have been exclusively provided by the State. As a result, these functions could well be deemed government action under the narrow public function test and continue to be subject to constitutional limitations.[24] Many other newly delegated functions, however, have not been exclusively performed by the State. Accordingly, these newly delegated functions may well not satisfy the public function test, and therefore they likely would be immunized from constitutional constraints.

In light of the changing nature of private-public relationships, it is particularly important that this Court maintain the pragmatic approach to the state action doctrine adopted in *Burton*. The *Burton* test will continue to allow courts to make reasonable judgments in particular cases about the presence or absence of state action. By preserving the *Burton* test, this Court will secure the ability of courts to ensure that governments cannot circumvent their constitutional obligations. As a result, the Court will prevent a departure from a long line of precedent protecting civil rights and civil liberties from infringement by abusive state action.

[24] Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 Am. U.L. Rev. 531, 604 (1989) (arguing that private incarceration would be found to constitute state action under the public function test).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Second Circuit should be reversed.

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APPENDIX

STATEMENTS OF INDIVIDUAL *AMICI*

The *NAACP Legal Defense and Educational Fund, Inc.* ("the Fund") is a non-profit corporation that was established for the purpose of assisting African Americans in securing their constitutional and civil rights. This Court has noted the Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). Attorneys for the Fund were counsel in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), *Evans v. Newton*, 382 U.S. 296 (1966), and other leading cases dealing with the issue of state action within the meaning of the Fourteenth Amendment.

The *National Asian Pacific American Legal Consortium* is a not-for-profit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans through a national collaborative structure that pursues litigation, advocacy, public education, and public policy development. NAPALC addresses violence, immigration, voting rights and other issues. As a civil rights organization, the Consortium is very concerned about guaranteeing access to Federal courts for litigants who believe that their rights have been violated by governmental actions.

The *National Women's Law Center* ("Center") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since its inception in 1972, the Center has actively participated in litigation to secure the rights of women and has participated in major Supreme Court cases addressing women's civil and constitutional rights under the law.

People For the American Way ("People For") is a nonpartisan, education-oriented citizens' organization es-

tablished to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has been actively involved in cases seeking to redress violations of Americans' fundamental constitutional and statutory rights. In this regard, People For has represented parties in litigation and filed *amicus* briefs before this Court in cases implicating fundamental rights under the First Amendment, the Fourteenth Amendment, and the major federal civil rights laws. People For is filing this *amicus* brief because of the importance of preserving and conscientiously applying the Court's well-established precedent in *Burton v. Wilmington Parking Authority* in order to protect and enforce Americans' fundamental federal constitutional and civil rights.

The *Puerto Rican Legal Defense & Education Fund, Inc.* (PRLDEF) is a national civil rights litigating organization dedicated to protecting and furthering the rights of Puerto Ricans and other Latinos. PRLDEF has represented and continues to represent clients with constitutional claims. The issue of state action is important to PRLDEF clients who often face First, Fifth and Fourteenth Amendment violations by quasi-governmental agencies.

Founded in 1971, the *Women's Legal Defense Fund* (WLDF) is a national advocacy organization working at federal and state levels to promote policies that help women achieve equal opportunity, quality health care, and economic security for themselves and their families.

WLDF has long advocated broad application of the state action doctrine to ensure that the constitutional guarantee of equal protection under the law protects women against invidious gender discrimination. Indeed, a narrow interpretation of state action doctrine could also constrict women's rights under state Equal Rights Amendments.